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IN THE

SUPREME COURT

OF THE UNITED STATES

79-6601

EUTUES WHITE

Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Eutues White, who is now held in the Illinois State Penitentiary, Pontiac Branch asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 53 of the rules of this Court.

The petitioner's affidavit in support to this motion is attached.

Eutues White

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AFFIDAVIT

I, Eutues White, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to pre-pay costs of fees:

1. I am the petitioner in the above-entitled cause;
2. Because of my poverty I am unable to pay the costs or fees of said cause;
3. I am unable to give security for same;
4. I believe that my case has merit;
5. Than I have sought to have my Constitutional rights reviewed by the appropriate state courts through the appropriate state procedures; And in the United States District Court and Seventh Circuit Court of Appeals.
6. That the claims I seek to present to this Court concern violations of my rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Eutues White

EUTUES WHITE
Petitioner

SUBSCRIBED AND SWORN TO
before this 29 day of
March, 1980.

Lisa ad L Ore

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-6601

EUTUES WHITE, Petitioner,

-vs-

FRED FINKBEINER, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

EUTUES WHITE, Petitioner,

-vs-

FRED FINKBEINER, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it please the Court:

Your petitioner, Eutues White, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit which affirmed the denial of his petition for a writ of habeas corpus on December 7, 1979. His Petition for Rehearing was denied on February 15, 1980.

II

OPINIONS BELOW

On October 8, 1969, Eutues White was convicted of murder after a jury trial in the Circuit Court of St. Clair County, Illinois. He was sentenced to a prison term of 199 to 200 years. The prosecution's case linking White to the murder primarily consisted of White's confession. At a suppression hearing held prior to trial, White

challenged the admissibility of the confession, asserting that he had requested counsel two days before he confessed, but that his request had been ignored by the police. The trial court denied the motion.

On appeal, the Illinois Appellate Court ordered that a new suppression hearing be held to determine whether Miranda warnings were given prior to any questioning of White. That opinion is reported as People v. White, 10 Ill. App. 3d 914, 295 N.E. 2d 300 (1973). (See Appendix A) At that suppression hearing, Police Captain William Johnson, of the East St. Louis Police Department, stated four times that White said he "didn't want to talk about it; he would rather see a lawyer". Upon being recalled as a witness at this hearing, Johnson stated that White did not ask for a lawyer but merely stated that he did not wish to talk to the police. The trial court again found the confession admissible, entered a new judgment of conviction, and imposed a sentence of not less than 66 nor more than 198 years. The Illinois Appellate Court affirmed this judgment in an opinion reported as People v. White, 22 Ill. App. 3d 180, 317 N.E. 2d 323 (1979). (See Appendix B)

The Illinois Supreme Court also affirmed this decision in an opinion reported as People v. White, 61 Ill. 2d 288, 335 N.E. 2d 457 (1975). (See Appendix C) The Illinois Supreme Court did find that there was a Miranda violation "which resulted from the failure of the police department to furnish White with a lawyer when he said he wanted to talk to one". 61 Ill. 2d 288, 296. The effect of the procedural violation of the Miranda standards however, "was sufficiently dissipated by lapse of time, repeated admonitions and other intervening events so that [White's] confession was voluntary and was therefore properly received in evidence". 61 Ill. 2d 288, 297. Subsequently, White filed a petition for a writ of certiorari in the Supreme Court of the United States. It was docketed as No. 75-5901. Certiorari was denied on March 22, 1976, and is reported at 424 U.S. 970.

White then petitioned the United States District Court for the Southern District of Illinois for a writ of habeas corpus. This

petition was dismissed without an evidentiary hearing and the decision is unreported. On appeal, the United States Court of Appeals for the Seventh Circuit remanded for an evidentiary hearing to determine: 1) whether White actually requested counsel when he was in custody; 2) whether White subsequently waived the request for counsel; 3) whether the officers acted in good faith in obtaining the confession; and 4) whether the reasoning of Stone v. Powell precludes federal habeas corpus relief. This decision is reported as White v. Finkbeiner, 570 F. 2d 194 (7th Cir., 1978). (See Appendix D)

A new evidentiary hearing was held before the Honorable Robert D. Morgan, Chief Judge of the U.S.D.C. for the Southern District of Illinois. At this hearing, Eutues White, Police Captain Johnson, his partner, William J. Stannis, and Cornelius O'Sullivan, the police officer who obtained White's statement, testified. All parties testified to events that occurred ten years earlier. The District Court concluded, as a matter of fact, that White did not make a request for counsel and that the confession was voluntary. The court did not decide whether Stone v. Powell precluded habeas corpus relief for Miranda violations. The order is unreported.

White appealed again, and this latest opinion is reported as White v. Finkbeiner, 611 F. 2d 186 (7th Cir., 1979). (See Appendix E) The Circuit Court affirmed the district court's judgment but on different grounds. It focused on the language of Miranda which states:

> If [the accused] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. 384 U.S. at 444-445 (emphasis in the original), 611 F. 2d 186, 190.

and determined that White requested counsel but subsequently waived the request. The court also rejected the Miranda per se rule against continued interrogation of an accused once a request for counsel has been made. In the particular circumstances of White's case the court found waiver as a matter of fact. Those circumstances were that (1) the interrogators who questioned White after he requested counsel did

not know of his request; (2) the officer to whom he made his request (Johnson) was not the "investigating officer"; (3) White's request for counsel was "off-hand"; and (4) the meeting between White and Johnson lasted only a few minutes. 611 F. 2d 186, 192-193. A petition for rehearing or alternatively for rehearing en banc was filed on December 26, 1979 and denied on February 15, 1980. The Circuit Court's holdings that Miranda does not establish a per se rule and that White waived his request for counsel are the subjects of this petition.

III

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is being filed within ninety (90) days of the final order below.

IV

QUESTIONS PRESENTED FOR REVIEW

1. May police officers continue to interrogate an accused who is in custody, and obtain a statement from him, once he requests counsel and that request is not honored; and whether such violation of the 6th Amendment right to counsel as it affects the 5th Amendment privilege against self incrimination is compatible with this Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966) that was recently reaffirmed in Fare v. Michael C., ___ U.S. ___, 99 S. Ct. ___, 61 L. Ed. 2d 197 (1979)?

2. Assuming arguendo that police officers may continue to interrogate an accused after a request for counsel is made, did the State of Illinois meet its heavy burden in this case to demonstrate a knowing and voluntary waiver of the right to counsel and privilege against self-incrimination where the arrestee was a borderline mental retardate and a known drug abuser who was subjected to three days of continuous interrogation about several murders following an illegal arrest?

V

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person...shall be compelled in any criminal case to be a witness against himself...

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right ...to have the Assistance of Counsel for his defense.

Amendment XIV

...nor shall any State deprive any person of life, liberty, or property, without due process of law.

VI

STATEMENT OF THE CASE

Eutues White, a nineteen year old youth, was arrested early in the morning on May 24, 1969. (Record of Suppression hearing--July 28, 1969, page 6; hereinafter, R. 6) No evidence was adduced as to why White was arrested. White testified though, at his federal court evidentiary hearing of February 20, 1979, that on May 24, 1969, he was walking down State Street in East St. Louis, Illinois, when he was accosted by two police officers who asked him for his name. (Evidentiary hearing of February 20, 1979, pages 10-11; hereinafter, S. 10-11) White denied that he was Eutues White but was then taken into custody and transported to the police station. (S. 10-11) He was placed in a cell where he remained from a half hour to an hour. He was then taken from the cell by an officer whom he did not know, to see Captain Johnson. (S. 11)

Johnson asked if White knew him and if White would like to talk about why he had been arrested. White testified that his answer to Johnson was: "No. I was down here to see a lawyer". (S. 12) White was then returned to his cell. (S. 12)

William J. Stannis, of the East St. Louis Police Department, testified that he saw Eutues White on May 24, 1969, in connection with

several armed robberies and homicides. He had not been notified that White had requested an attorney. (S. 36) At White's state trial, Stannis testified that he talked to Eutues White for several hours on May 24, 1969. (Trial transcript, page 64; hereinafter, T. 64) He spoke with White twice the next day--for at least two hours in the morning and for a few hours in the afternoon before 4 p.m. (T. 65) White seemed nervous. (T. 64)[1] On May 26th, Detective Stannis questioned White again before White signed the confession. (T. 65) White told Stannis that he used drugs. (T. 79)

Detective O'Sullivan, Stannis' partner, testified that he too, talked to White before he confessed on the morning of the 26th. (S. 11) The confession was typed up by Detective Stannis from the notes he had taken during the interrogation. (R. 7, 8) Detective O'Sullivan also testified that Eutues White was placed in a lineup and that he was palm-printed on May 25th, but that neither of these events pertained to the charge for which White was prosecuted. (R. 13) Finally, at 12:45 p.m. on May 26, 1969, Eutues White signed a statement confessing to murdering Bruce Reinheimer, a seventeen year old gas station attendant whom White allegedly robbed.

At his trial, Eutues White testified that he did not remember signing any confession. (T. 141) He denied ever participating in the robbery of Mr. Reinheimer (T. 141) and denied killing him. (T. 141) In fact, White did not recall being in jail at all in May of 1969. (T. 142)

White also testified that he was using drugs prior to his arrest. (T. 141) His doctor, Calvin Benton, testified at trial that when he saw White on April 9, 1969, it was discernable that White was on drugs. (T. 125) Dr. Benton saw White again on May 1, 1969, in the emergency room of Christian Welfare Hospital. (T. 125) He was called because White was having auditory and visual halluncinations. (T. 125) Dr. Benton recommended that White's aunt commit him to the

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[1]White later described his own condition at this time as "paranoid, hallucinating, you know, the shakes, nervous". (S. 13)

Alton State Hospital. (T. 126) His aunt took him to her sister's where they all watched him. (T. 114)

In August, 1969 Eutues White underwent a psychiatric examination in the Belleville County Jail to determine whether he was capable of standing trial. (Competency hearing of September 12, 1969, page 8; hereinafter, C. 8) He was examined by Dr. Frank Perez, who was the Medical Director of The Belleville Mental Health Out Patient Center and consultant to the Psychiatric Division of the Menard Prison. (T. 135) Dr. Perez showed Eutues White a signed confession to the Reinheimer murder along with signed confessions to two other murders and an indictment for yet another murder. (C. 8) White stated:

> "I did not commit the crimes. I do not remember signing any papers. When I was picked up by Officers, Peytom and Hughes I was under the influence of amphetamines. They say I did it. I remember only being held there. I told them I wanted a doctor. I had the idea that they wanted to kill me. They were torturing me. They were saying, 'We have evidence. We know people who said you did it.' Then they took me on a lineup, they said somebody identified me. Trickery. Then they ran out, typed statements, put in their words, then shoved the statements in front of me, I had no lawyer present. Maybe I signed." (C. 9)

Dr. Perez determined Eutues White competent to stand trial. He also found that White showed poor understanding, he lacked insight, and his I.Q. of 76 placed him in the range of borderline mental retardation. (C. 10) The possibility of minimal brain damage could not be ruled out. (C. 10)

VII

REASONS FOR GRANTING CERTIORARI

I THE CIRCUIT COURTS OF APPEALS ARE CURRENTLY IN A STATE OF CONFUSION AS TO THE VALIDITY OF THE PER SE RULE THIS COURT FIRST ANNOUNCED IN MIRANDA V. ARIZONA, 384 U.S. 436 (1966), AND RECENTLY REAFFIRMED IN FARE V. MICHAEL C., ___ U.S. ___, 99 S. Ct. ___, 61 L. Ed. 2d 197 (1979), WHICH COMMANDS THAT ONCE A SUSPECT IN CUSTODY REQUESTS THE ASSISTANCE OF COUNSEL ALL INTER-

ROGATIONS BY POLICE OFFICERS MUST CEASE UNTIL COUNSEL IS PROVIDED. THIS COURT IS CALLED UPON TO SET FORTH EXPLICITLY THAT RULE OF LAW ONCE MORE.

The United States Court of Appeals for the Seventh Circuit held that despite the fact that White had initially requested counsel prior to confessing, subsequent interrogation by police officers was proper. White v. Finkbeiner, 611 F. 2d 186, 188, 194 (1979). In so holding the Court eschewed the per se rule of Miranda v. Arizona, 384 U.S. 436 (1966), which prohibits a resumption of questioning of an accused once a request for counsel is made, and instead chose to adopt a case-by-case analysis of waiver of rights. The Court justified its departure from the per se rule of Miranda stating that the "[a]doption of a per se rule would lead to a mechanical approach to the resolution of the particular cases we face". 611 F. 2d 186, 191. The rationale for this new standard, albeit erroneous, is the Court's belief that "[a] per se rule which provided that a suspect could never waive a prior request for counsel would imprison a suspect in his privileges". 611 F. 2d 186, 191. Thus the Court concluded under "certain" circumstances an accused, who had earlier requested counsel, may knowingly and voluntarily relinquish that right. 611 F. 2d 186, 191.

The views of the Court below are at odds with the explicit pronouncements of this Court. In adopting a per se rule prohibiting the continued interrogation of a suspect after a request for counsel, Miranda v. Arizona, 384 U.S. 436 (1964), this court said: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present". 384 U.S. 436, 474. This per se rule was again addressed by this Court in Michigan v. Mosley, 424 U.S. 96 (1975). In Mosley this Court was concerned with interrogation following an initial assertion of the right to remain silent. Mosley held that an assertion of the right to remain silent did not preclude further interrogation at a later time if the right to remain silent was scrupulously honored. The Mosley court adhered however to the

Miranda procedure as to a request for counsel because the assertion of the right to remain is different from a request for counsel. The Mosley Court noted that Miranda distinguished

> "...the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only [i]f the individual states that he wants an attorney." 384 U.S. at 74. Mosley, 423 U.S. 94, 104 n. 10.

Mr. Justice White further discussed the procedure to be followed when an attorney is requested, in his concurring opinion in Mosley. He said that when the Court wanted to create a per se rule against further interrogation it knew how to do so. He then went on to quote the above statement from Miranda, 423 U.S. 94, 109.

The per se rule was most recently reaffirmed by this Court in Fare v. Michael C., ___ U.S. ___, 99 S. Ct. ___, 61 L. Ed. 2d 197 (1979). In Fare this Court held that a juvenile suspect's request to see his probation officer did not constitute a request for an attorney or an invocation of the right to remain silent. Mr. Justice Blackmun, writing for the court, restated approvingly the per se rule of Miranda three times. 61 L. Ed. 2d 197, 202, 207-208, 209. He wrote:

> The per se aspect of Miranda was thus based on the unique role the lawyer plays in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason the Court fashioned in Miranda the rigid rules that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease. 61 L. Ed. 2d 197, 209.

It should be clear that the mandatory language in Miranda, Mosley and Fare established and continues to recognize a per se rule prohibiting the police from interrogating a suspect once a request for counsel is made. Yet in the instant cause, the Court of Appeals for the Seventh Circuit chose to conclude that the per se rule was no

longer valid and that the rule "imprisons a suspect in his privileges". Cf. Faretta v. California, 422 U.S. 806 (1975); White v. Finkbeiner, 611 F. 2d 186, 191.

It is White's position, based on the prior holdings of this Court, that once a request for counsel is made, no waiver of counsel can be considered knowing or voluntary until the suspect has had an opportunity to consult with an attorney. Once the suspect has been given the opportunity to consult with an attorney, any subsequent waiver of rights, made knowingly and intelligently, would be valid. This procedure would be in accord with the holding in Faretta v. California, 422 U.S. 806 (1975). In Faretta, the Court held that a defendant could insist on his right to defend himself, but only after he has been "made aware of the dangers and disadvantages of self-representation". 422 U.S. 806, 835. Similarly, once a suspect has requested counsel, he has invoked his privileges. Any subsequent waiver made without a showing that the suspect was fully aware of the dangers and disadvantages of submitting to interrogation without the assistance of counsel cannot be knowing or voluntary, and the only way to assure that he is aware of those dangers would be for him to consult with an attorney. Indeed, in Fare v. Michael C., 61 L. Ed. 2d 197, 208, it was recognized that the request for counsel is an indication that the suspect feels the need for assistance in protecting his Fifth Amendment privilege.

This Court has continued to reaffirm the per se rule and the rationale behind it, as is evidenced by Mosley and Fare, yet the Circuit Courts of Appeals are currently in a state of confusion as to the validity of the rule. Prior to the instant case, the Seventh Circuit had adhered to the per se rule. See, U.S. ex rel. Williams v. Twomey, 467 F. 2d 1248 (7th Cir., 1972). There, the court said: "Regarding the failure to provide counsel, once appellant requested it, that omission is sufficient by itself to require suppression of the written statement." 467 F. 2d 1246, 1252. The Williams court also said that to prove waiver of the right to counsel the record must contain strong affirmative evidence of a knowing and intelligent

waiver. 467 F. 2d 1246, 1251.

The Seventh Circuit Court of Appeals confirmed its acceptance of the per se rule in White's first appeal, White v. Finkbeiner, 570 F. 2d 194 (1978), when in discussing the findings from the record it stated:

> "[s]hould the [District] court find that White did ask to see an attorney at any time he was held in custody, Miranda would require suppression of any statement thereafter obtained from White, at least absent a finding that he later voluntarily retracted his request for counsel and effected a knowing and intelligent waiver of his Miranda rights." 570 F. 2d 194, 201.

Less than two years later, the court reversed itself in White's second appeal, White v. Finkbeiner, 611 F. 2d 186 (1979), stating that "a per se approach may be going too far toward protecting the rights at stake" and that "[a]doption of a per se rule would lead to a mechanical approach to the resolution of the particular cases we face". 611 F. 2d 186, 191. In between the two White cases, the District Court, for the Northern District of Illinois, followed Williams v. Twomey and held that a per se rule exists. U.S. ex rel. Sanders v. Rowe, 460 F. Supp. 1128 (N.D., Ill., 1978).

Other circuit courts are having difficulty determining this issue as well. The Fifth Circuit recently acknowledged the per se rule of Miranda in Nash v. Estelle, 597 F. 2d 513 (1979), but with a proviso. It allowed for police inquires into the suspect's wishes if his request for counsel is "equivocable". 597 F. 2d 513, 517. The Nash court quoted Michigan v. Mosley, 423 U.S. 96 (1975), as support for holding that when "a desire for immediate talk clearly appears from the suspect's words and conduct, but he also states he wants a lawyer (i.e., 'I would like to have a lawyer, but I would rather talk to you'), it is sound and fully constitutional police practice to clarify the course the suspect elects to choose". 597 F. 2d 513, 517. Not only does the Nash approach fly in the face of Miranda, which holds that a request for counsel need not be explicit, 384 U.S. 436, 444-445, but the court's reliance on Mosley is inapposite. Mosley dealt with invocation of the right to remain silent.

The Nash court has embarked on a slippery slope type of analysis. Once the police determine that a suspect's request is equivocable, it is a short step from "clarifying" the suspect's wishes to subtly coercing a confession. It is likely that a suspect will lose the will to continuously reassert his rights when his requests for counsel are ignored-it appears futile. This is particularly true for the unsophisticated suspect who has limited mental abilities combined with a lack of familiarity with the criminal justice system. The police have an affirmative duty to provide counsel prior to any interrogation. Miranda v. Arizona, 384 U.S. 436, 474. They must be expected to fullfill this mandate.

In Cobbs v. Robinson, 528 F. 2d 1331 (1975), cert. denied, 424 U.S. 947 (1976), the Court of Appeals for the Second Circuit similarly began a case by case adjudication of when and how a suspect waives his right to counsel after his request had not been scrupulously honored. There, the record established that following a conversation with police officers the suspect stated that he wished to call his lawyer before he "told them what actually occurred". 528 F. 2d 1331, 1342. Cobbs was given free access to the telephone but instead of calling a lawyer, he called his grandmother who came down to the station and spoke with him alone. Cobbs then confessed. The court never even mentioned the mandate of Miranda in its discussion of the issue. It held that "Cobbs acted freely and voluntarily; and he knowingly and intelligently waived his right to remain silent". 528 F. 2d 1331, 1342.

In United States v. Grant, 549 F. 2d 942 (1977), cert. denied, 432 U.S. 908 (1977), the Fourth Circuit addressed this issue. It determined that a heroin addict, who was suffering from withdrawal, waived his right to counsel. After initially requesting a lawyer, FBI agents sought identifying information from the suspect and stayed to answer his questions concerning the procedures of his arrest. Eventually, the suspect confessed. The Court held that Miranda did not erect "an absolute per se bar on any conversation with the accused by the investigating officers after the former has requested

counsel. It only inhibits investigative interrogation related to the specific crime itself." 549 F. 2d 942, 946.

The Sixth Circuit recognized the per se rule in Maglio v. Jago, 580 F. 2d 202 (1978), but reserved judgment on it. Instead, the court based its decision on the accused's Sixth Amendment right to counsel, and held that the accused did not knowingly and intelligently waive his right. In U.S. v. Rodriguez-Gastelum, 569 F. 2d 482 (9th Cir., (1978) (en banc), a divided Ninth Circuit held that a per se rule prohibiting such a waiver is neither necessary nor appropriate. Case by case adjudication was preferred. 569 F. 2d 482, 487.

It is time for this Court to delinate what sort of attention must be paid to a suspect's request for counsel. The Circuit Courts of Appeals are floundering and carving out diluted standards. Their holdings leave many questions unanswered. Do the police have to abide by a per se rule against any and all interrogation of a suspect once counsel has been requested? Can police question a suspect on identifying data once he has requested counsel? What if that data has already been obtained? Can the police reinterrogate on identifying material? What obligation do the police have for providing a suspect with an attorney? Miranda provides that police must make known to a suspect that if he wants an attorney and cannot afford one, a lawyer will be provided for him prior to any interrogation. 384 U.S. 436, 474. Is it enough to leave a suspect alone with a telephone? At the very least, can a suspect withdraw his initial request for counsel without the benefit of advice from counsel?

In adopting the per se rule in Miranda, this Court recognized the coercion inherent in custodial interrogations. The rule, as stated in Miranda, is clear and easily enforceable. A retreat from the rule will require the courts of this nation to speculate in each case as to the voluntary nature of any statement obtained after a request for counsel is made. To hold, once this request is made and ignored, that subsequent interrogation produces voluntary waiver of the rights to remain silent and to counsel, is to ignore the very basis of the holding in Miranda.

Certiorari should be granted in this case so that this Court can settle the question of the validity of the rule prohibiting interrogation once a request for counsel is made. By reaffirming the per se rule of Miranda, this Court can provide an enforceable safeguard for those individuals attempting to exercise the Fifth Amendment privilege to remain silent.

II IF THIS COURT IS NOW GOING TO REVERSE ITSELF AND ALLOW POLICE INTERROGATIONS AFTER A REQUEST FOR COUNSEL HAS BEEN MADE, THEN THE TOTALITY OF THE CIRCUMSTANCES TEST NECESSITATES A FINDING THAT WHITE'S CONFESSION BE DEEMED INVOLUNTARY SINCE HE COULD NOT HAVE KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHTS DUE TO HIS LIMITED INTELLECTUAL FUNCTIONING AND HIS DRUG INDUCED STATE OF MIND AT THE TIME OF HIS ILLEGAL ARREST.

This Court can decide, as the Seventh Circuit has, that the per se rule prohibiting interrogation once a request for counsel is made, as set forth in Miranda v. Arizona, is a "paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case. Cf., Faretta v. California, 422 U.S. 806 (1975) and that it imprisons a man in his privileges. Adams v. U.S. ex rel. McCann, 317 U.S. 269, 380 (1942)." 611 F. 2d 186, 191. However, even if this Court adopts this view, White's confession must be suppressed. The recent case of North Carolina v. Butler, ___ U.S. ___, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), reiterated and elaborated the standard for waiver of Fifth Amendment rights first established by Johnson v. Zerbst, 304 U.S. 458 (1938). Johnson requires that waiver must be determined by "the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. The government must show an intentional relinquishment or abandonment of a known right or privilege". 304 U.S. 436, 464.

North Carolina v. Butler was not a case where the accused requested an attorney. The accused orally waived his right to remain silent but refused to sign the written waiver form. He then made

inculpatory statements. This Court stated:

> An express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably necessary or sufficient to establish waiver. The question is not one of form, but rather the defendant in fact knowingly and voluntarily waived the rights deliniated in the Miranda case. As was unequivocally said in Miranda, mere silence is not enough...The Court must presume that a defendant did not waive his rights; the prosecution's burden is great... ___ U.S. ___, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286, 392.

The Petitioner here did not knowingly and voluntarily waive his rights as deliniated in Miranda. In Miranda, the Court said that a valid waiver could not be inferred from silence or from the fact that a confession was in fact obtained. 384 U.S. 386, 475. Miranda also held "that effective waiver of the right to counsel during interrogation could not be recognized unless specifically made after the warnings we here deliniate have been given". 384 U.S. 436, 470 (emphasis added). Clearly White made no "specific" or express waiver of his right to counsel.

The Court of Appeals based its holding that White waived his rights on two erroneous factors. The Court first noted that although White was subjected to interrogation after his request for counsel was made, those interrogations occurred without any knowledge of White's original request for counsel. The Court characterized White's request as "off-hand". 611 F. 2d 186, 193. The Illinois Supreme Court held that White's request for counsel must be imputed to all other investigators. See, People v. White, 61 Ill. 2d 288, 294, 335 N.E. 2d 457, 461 (1975). Relieving the officers of responsibility for informing other officers of a request for counsel can only invite the invention of new strategies to produce coerced waiver of the right to counsel. This distorts and erodes Miranda's principles.

The Court of Appeals also believed that the waiver was voluntary because there was a delay of almost two days between White's request for counsel and the interrogation that produced the confession. The

court stated that White had time to "reflect on his previous request". 611 F. 2d 186, 193. In reality, White had no time to "reconsider his prior decision and evaluate the situation without the presence or prodding of officials". (citations omitted) 611 F. 2d 186, 193. After he requested counsel, White was immediately returned to his cell but was interrogated again that same day and all of the next day before he confessed on May 26th. (R. 36-40) Additionally, White was placed in a line-up and was palm-printed on May 25th. (R. 42) This is exactly the kind of coercion Miranda sought to avoid. Psychological intimidation undermines the accused's Fifth Amendment right to be free from compelled self-incrimination. This is especially true where White's request for counsel was not honored. The Court of Appeals did not give due consideration to other factors concerning the arrest and interrogation of White. Serious questions exist as to the legality of White's arrest. The only evidence concerning White's arrest comes from his testimony at the hearing before the District Court. White testified that he was simply walking down the street when he was arrested. (R. 10-11) Nowhere in this case has the State even sought to establish probable cause as justification for White's arrest.

Furthermore, at the time of the interrogation White was a 19 year old youth, who according to Dr. Perez, the examining psychiatrist, had an IQ of 76, classifying him as a borderline mental retardate. (C. 8)

Prior to his arrest, White testified, he had been "shooting" amphetamines and described his mental condition as "paranoid, hallucinating, you know, shakes, nervous". (R. 13) Officer Stannis stated that during one of the interrogation sessions White said that he used drugs. (T. 79)

The repetition of the Miranda warnings might have some limited value on tending to lessen the coercive nature of the interrogation, but the mere repetition of the warnings does not remove all coercion. Brown v. Illinois, 422 U.S. 590 (1975). The fact that White actually signed a waiver form as well as the written confession itself does

not establish the voluntary nature of either act. North Carolina v. Butler, ___ U.S. ___, 99 S. Ct. 1755, 60 L. Ed. 2d 286, 292 (1979).

The Court of Appeals stated that the State of Illinois had a heavy burden of proving waiver in light of the initial request for counsel. 611 F. 2d 186, 192. Recognizing the inherently coercive nature of police station interrogations, coupled with White's limited intellectual abilities that were further impaired by his drug use, it is impossible to accept that Eutues White made an intelligent and knowing waiver of his rights to remain silent and to have the assistance of counsel.

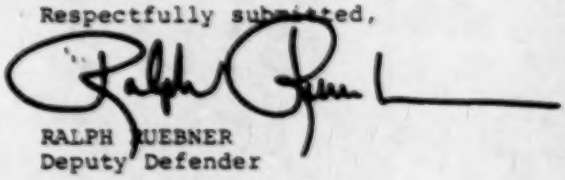
If this Court is willing to retreat from the per se rule prohibiting interrogation once a request for counsel is made, the instant case presents a factual situation which will allow this Court to set standards for evaluating when a waiver of rights obtained after a request for counsel can be considered voluntary. White believes that the facts of record in this cause establish that he made no voluntary or intelligent waiver of his rights, and that his confession should not have been admitted against him during his trial.

VIII

CONCLUSION

Certiorari should be granted in the instant cause to clarify the rights of individuals, subject to police custodial interrogation, to the enjoyment of their Fifth and Sixth Amendment rights to be free from compelled self-incrimination and to the assistance of counsel as part of the Fourteenth Amendment guarantee of due process.

Respectfully submitted,



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APPENDIX A

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LUTHER WHITE, Defendant-Appellant.

(No. 71-70; Remanded.)

Fifth District—March 29, 1973.

1. CRIMINAL PROCEDURE (§ 406)—*State need not rely upon defense stipulation as to death of victim—murder.*

State had right to prove every element in crime charged and, in murder prosecution, was not obligated to rely on defense stipulation as to death of purported victim.

2. HOMICIDE (§ 53)—*when State is allowed to put on "life and death" witnesses.*

In murder prosecution, State is allowed to put on "life and death" witnesses to establish identity of deceased.

3. SAME (§ 61)—*when testimony of "life and death" witness is properly admitted.*

Testimony of purported murder victim's father, wherein witness, after testifying in effect that one of his two sons was killed, testified twice, in response to questions of State's Attorney, that his son was seventeen years, five months, and six days old at time of death, would be held not so material as to have significant effect upon conviction and did not constitute reversible error.

4. CRIMINAL PROCEDURE (§ 249)—*State's Attorney may examine witness regarding reenactment in which State's Attorney participated.*

For State's Attorney to examine witness concerning reenactment of charged murder allegedly reenacted by accused in presence of police officers and State's Attorney would not be held improper even though State's Attorney had participated in alleged reenactment.

5. SAME (§ 459)—*when argument of State's Attorney is not prejudicial.*

State's Attorney who, according to convicted accused, not only argued credibility of State's other witnesses but also forcibly put accused's credibility before jury, but who did not state his personal knowledge of guilt, would not be held to have committed reversible error.

6. SAME (§ 301)—*when evidence is insufficient to support hypothetical question sought to be asked of psychiatric expert.*

Evidence in murder prosecution of accused who had signed confession was insufficient to support hypothetical question asked by counsel for accused who sought to introduce opinion testimony of psychiatric expert that such an individual as accused, while under influence of drugs or suffering withdrawal symptoms, might confess to crime he did not commit.

7. SAME (§ 293)—*trial court has wide discretion regarding admission of expert testimony.*

Trial court has wide discretion in determining admissibility of expert testimony in criminal prosecution.

8. SAME (§ 977)—*when remand for hearing on admissibility of confession is warranted.*

Where record contained no evidence to indicate that incarcerated murder accused, who signed confession, was or was not given required *Miranda* warnings prior to any questioning, so that evidentiary record was inadequate for proper review of propriety of dismissal of motion to suppress confession, Appellate Court could reverse and remand for new trial or could remand for new full and complete hearing on admissibility of confession.

9. SAME (§ 977)—*when case will be remanded for hearing on admissibility of confession.*

Where convicted murder accused who had signed confession while incarcerated, which confession was admitted into evidence, did not receive full evidentiary hearing in trial court on voluntariness of confession, including rights afforded him by *Miranda* case, Appellate Court on appeal would remand case for new full and complete hearing on admissibility of confession.

10. SAME (§ 951)—*if confession was improperly admitted defendant would be entitled to new trial.*

If confession admitted into evidence in murder prosecution were held inadmissible as result of hearing directed on remand of case by Appellate Court, convicted accused would be entitled to have judgment vacated and to be granted new trial.

11. SAME (§ 979)—*if confession was properly admitted new judgment of conviction could be entered.*

If confession admitted into evidence in murder prosecution were held admissible as result of hearing directed on remand of case by Appellate Court, trial court would enter new judgment of conviction and impose indeterminate sentence pursuant to sentencing provisions of new Code of Criminal Corrections. (Ill. Rev. Stat. (1972 Supp.), ch. 38, pars. 1005—8—1(a), (b) (1), 1008—2—4).

APPEAL from the Circuit Court of St. Clair County; the Hon. HAROLD O. FARMER, Judge, presiding.

Paul Bradley, of Defender Project, of Mt. Vernon, (Kenneth L. Jones, of counsel,) for appellant.

Robert H. Rice, State's Attorney, of Belleville, (Philip C. Feder, Assistant State's Attorney, of counsel,) for the People.

Mr. PRESIDING JUSTICE GEORGE J. MORAN delivered the opinion of the court:

Defendant appeals from a judgment of the Circuit Court of St. Clair County sentencing him to the Illinois State Penitentiary for a minimum of 199 years and a maximum of 200 years after a jury had found him guilty of the crime of murder.

On November 27, 1968, Bruce Reinheimer was employed at a gasoline station in East St. Louis, Illinois. At approximately 10:00 P.M. that evening, he left the station to service a car and never returned. His body was found later that night in Centreville, Illinois. The cause of death was a gunshot wound to the head. There were no witnesses to the crime.

The defendant, Eutues White, was arrested on the morning of May 24, 1969 and incarcerated in the East St. Louis jail by two officers of the East St. Louis Police Department. He was interrogated for several hours on that day, the morning and afternoon of the following day and in the morning of the next day. In the afternoon of May 26, 1969, the defendant signed a formal statement which contained his written waiver of the rights afforded him under the decision of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, and a confession to the murder of Bruce Reinheimer. Later that day the defendant allegedly reenacted the crime in the presence of police officers and the State's Attorney. Prior to the trial a hearing was held on defendant's motion to suppress the confession. This motion was denied. At the trial the defendant testified that he did not kill Bruce Reinheimer, that he did not remember giving the confession in question, and that he did not remember re-enacting the crime.

The first issue is whether the trial court committed reversible error in allowing the introduction of irrelevant and immaterial testimony which inflamed the passions and prejudices of the jury against the defendant.

The State's first witness was the father of the deceased. The defense objected to his testimony on the grounds that the only relevant testimony that he could offer, that his son was dead, would be outweighed by the prejudicial effect his testimony would have on the jury. The defense also offered to stipulate that the witness's son was dead. The court overruled the objection, provided the State's Attorney could advise the witness not to make any sort of emotional outburst. During the questioning of the deceased's father, the witness in response to a question of whether he had any children, stated that he had one boy left and that one was killed. When asked how old the deceased was when he was killed, he responded

"seventeen years, five months and six days". Later, in questioning, the State's Attorney again asked the witness how old the son was at the time of his death. The response was the same, "seventeen years, five months, six days". During closing argument the State's Attorney made a reference to the youth of the deceased. He said, "This is a seventeen year old boy. He was just a part-time man who had just started on his career in life."

The appellant argues that such testimony by the father, especially the detailed account of the age of his deceased son was evidence introduced to inflame the passions of the jury against the defendant. In support of his argument the appellant draws an analogy to a line of cases which hold that testimony concerning the family left behind by the deceased is so inflammatory that its introduction was reversible error. (*State v. Bernette*, 30 Ill.2d 359.) The rule set down in *Bernette* was that when testimony elicited in a murder case concerning a family left behind by the deceased was not elicited incidentally, but presented in such a manner as to cause the jury to believe it as material, its admission is highly prejudicial and constitutes reversible error. (See also *People v. Washington*, 54 Ill.App.2d 467, and *People v. Tate*, 58 Ill.App.2d 479.) Although there is an obvious difference between testimony concerning the family left behind by the deceased and testimony which stresses the youth of deceased at the time of his death, certainly a valid analogy can be drawn between the two. For the purpose of both types of testimony when not elicited incidentally is to prejudice the defendant in the eyes and minds of the jury.

However, there is another line of cases since the holding in *Bernette* which tend to moderate *Bernett's* impact. For instance, in *People v. Jordan*, 38 Ill.2d 53, the court held that every mention of the deceased's family does not *ipso facto* entitle the defendant to a new trial, since in certain instances such a statement can be harmless. (See also *People v. Lee*, 44 Ill.2d 151 and *People v. Tillman*, 116 Ill.App.2d 24, for similar holdings.) The court in *People v. Vasquez*, 118 Ill.App.2d 66, explained that not all references to family require reversal. Rather, the court must determine if it is more than incidental. Likewise, all references to a deceased's youth would not require reversal, but once again the court must determine if it was incidental.

1, 2 There is also a line of cases which state that the State is entitled to present "life and death witnesses" to show that deceased's identity and to prove that he has died. Thus, in *People v. Speck*, 41 Ill.2d 17, the court said:

> "A further contention is that the court erred in admitting certain alleged prejudicial evidence. It is argued that the defendant was prejudiced by reason of the fact that close relatives of the slain

girls were called by the prosecution as 'life and death' witnesses to establish the identity of the girls and to the fact that they were deceased. Counsel for the defendant says that he was willing to stipulate to the identity of the girls and to the fact that they had met their death by criminal means. However, the defendant pleaded not guilty and the State had the right to prove every element of the crime charged and was not obligated to rely on the defendant's stipulation." 41 Ill.2d at 201.

The court went on to hold that there was no undue emphasis in the proof or in argument of the fact that the victims left a family surviving and cases such as *People v. Bernette* are not applicable. See also *People v. Cannon*, 49 Ill.2d 162, for a similar holding that life and death witnesses could be put on. Thus, the appellant's argument that he wished to stipulate that the deceased was in fact dead and to his identity was not something which he could assert by right, for, as said in *Speck*, the State had the right to prove every element in the crime charged and was not obligated to reply on the defendant's stipulation. Also, the State is allowed to put on "life and death" witnesses to establish the identity of the deceased.

● 3 This issue would have to be regarded as very close. However, in our opinion, the testimony was not so material as to have a significant effect upon the conviction of the defendant. Therefore, we do not find reversible error on this issue.

The next issue is whether improper conduct on the part of the State's Attorney deprived the defendant of a fair trial.

● 4 The appellant argues that since the State's Attorney participated in the alleged reenactment of the crime, it was improper for him to examine the witnesses concerning the reenactment. We have found no authority which holds that it is reversible error for a State's Attorney to participate in a trial after he was a participant in the reenactment of the crime for which the defendant is being tried. In the absence of any authority on this question, we cannot say that the State's Attorney committed error in so doing. However, we find that the State's Attorney's participation in the reenactment of the crime in the presence of the jury was highly undesirable.

● 5 Appellant also stated that during his final argument, the State's Attorney argued not only the credibility of the State's other witnesses, but also forcefully put his credibility before the jury. Appellant argues that this is improper conduct and in support of this argument cites *People v. King*, 278 Ill. 138, wherein the prosecutor stated his personal knowledge of defendant's guilt and the court reversed because this put the prosecutor in the position of being a witness without giving the accused

an opportunity to cross-examine him. However, *People v. King* is not in point because the State's Attorney in the present case did not claim that he knew the defendant was guilty, but rather, during final argument claimed that he did not frame nor manufacture evidence. We therefore find no reversible error in this issue.

The next issue is whether the defendant was unfairly limited in examination of an expert witness.

● 6 At the trial the defendant attempted to introduce the opinion testimony of a psychiatric expert that such an individual as the defendant, while under the influence of drugs or suffering withdrawal symptoms, might confess to a crime he did not commit. The State objected to the form of the question because it felt there was no evidence in the record that defendant was hallucinating at the time of his arrest. In support of his claim, the defendant cites *People v. Yonder*, 44 Ill.2d 376. The appellant contends that *Yonder* stated that a proper hypothetical question must be limited to facts supported by the evidence in the case, but may also be limited to those facts favorable to the questioner. However, *Yonder* also stated that in asking a hypothetical question, a party may include only proved facts. There were no proved facts that defendant was suffering hallucinations at the time he gave the confession.

The appellant also cites *People v. Penman*, 271 Ill. 52, in which it was held improper to exclude an expert's opinion as to the effects of cocaine poisoning based on an examination a day after the occurrence and without any specific testimony that the drug defendant had taken was in fact cocaine. However, *Penman* can be distinguished from the present case. For in *Penman* there was evidence of the defendant's condition symptoms, the cause of which a witness having expert knowledge of the effect of drugs might form a reasonable opinion which would be a proper basis from which the jury might reasonably infer the taking of a particular drug. In the present case there was no evidence of conditions and symptoms at the time of the interrogation and confession which would allow the jury to infer the taking of a particular drug.

● 7 Rather, it is submitted that the court properly determined that there was insufficient evidence in the case to support the hypothetical question, and it has been held that the trial court has a wide degree of discretion in determining the admissibility of expert testimony. In *People v. Oberlander*, 109 Ill.App.2d 469, the court held:

> "It has been well established that the admissibility of expert testimony is to be determined by the trial judge and a wide latitude of discretion is given to the court in the determination of such admissibility, unless it is clearly and prejudicially erroneous." 109 Ill.2d at 471.

We find no merit in this contention.

The last issue is whether the trial court erred in denying defendant's motion to suppress the confession.

Defendant was arrested on the morning of May 24, 1969 by two police officers from the East St. Louis Police Department and incarcerated in the East St. Louis jail. He was questioned by a Lieutenant Johnson of the East St. Louis Police Department on the morning of the 24th and by William J. Stanis, an officer of the East St. Louis Police Department that afternoon. The record does not reflect whether he was advised at any time on that day of the rights afforded him by the decision of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 16 Ed.2d 694, 86 S.Ct. 1602. Defendant was questioned again in the morning and afternoon of the second day by Stanis, and again the record does not indicate whether or not he was advised of his *Miranda* rights any time on that day. He was again questioned by Stanis in the morning and the afternoon of the third day, May 26, 1969, and on that afternoon in the presence of Stanis and of Captain Cornelius O'Sullivan, signed a written confession to the murder of Bruce Reinheimer, which reads in part:

"DEPARTMENT OF POLICE
East St. Louis, Illinois

Date: May 26, 1969
Time Started: 12:45 P.M.
Time Completed: 1:30 P.M.

STATEMENT

I, Eutues White, have been advised by Capt. C. O'Sullivan and Det. W. Stanis that I have a right to remain silent and that I do not have to make any statement, answer any questions or talk to Them nor answer any question directed to me; I have further been advised that anything I say or any statement I give can and will be introduced into evidence in Court against me; I have been further advised that if I want an attorney to be present at this time or anytime hereafter, I am entitled to such attorney, and that if I cannot afford to pay for any attorney that an attorney will be furnished to me if I so desire, and that if I do desire an attorney I do not have to make any statement or answer any question until such time as an attorney has consulted with me.

Having been advised of these rights as above, I hereby voluntarily agree to make a statement, to answer questions asked of me and I waive my right to have an attorney as above set forth. I further state that I have not been threatened or mistreated in any fashion

nor have any promises of leniency been made to me in return for making this statement.

/s/ Capt. C. O'Sullivan
Witness
/s/ Det. W. Stanis
Witness"

/s/ Eutues White

A fair reading of the record, including the language quoted in the above statement indicates that the *Miranda* warnings were given on the third day of defendant's incarceration, just before the statement was taken. The record does not reflect whether any *Miranda* warnings were or were not given on either the first or second day of his incarceration. Evidence surrounding the questioning on May 24 and 25 might disclose that the questioning was done without the *Miranda* warnings. Under such circumstances it could well be a deprivation of defendant's rights against custodial interrogation if the questioning resulted in an inculpatory statement or confession, notwithstanding the fact that the written statement, when prepared and signed following the questioning, contained the requisite advisory of rights and a waiver thereof. (*Westover v. United States*, 384 U.S. 436, 16 L.Ed 2d 694, 86 S. Ct. 1602). After the hearing, the motion to suppress the confession was denied without any findings of fact or conclusions of law.

In *Miranda v. Arizona*, the Supreme Court of the United States said at 384 U.S. 444-445:

> "Our holding will be spelled out with some specificity in the pages that follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If,

however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him."

● 8 Since there is no evidence in the record to indicate that the defendant was or was not given the required *Miranda* warnings prior to any questioning, we find that the evidentiary record before us is inadequate for a proper review of the propriety of the trial court's dismissal of the motion to suppress the confession. Under these circumstances we can reverse and remand the case for a new trial because the trial court erred in overruling defendant's motion to suppress the confession, or we can remand the case for a new full and complete hearing on the admissibility of the confession covering the time when defendant was first taken into custody up until the time he gave the confession.

The latter procedure was used by our Supreme Court in *People v. McGuire*, 35 Ill.2d 219, where the court said at 229:

"• • • We believe that this case should be remanded, not for a full new trial, but for a new hearing on the admissibility of the defendant's statement. At such a hearing both parties will have an opportunity to present further evidence. [Cases cited.]"

In *Townsend v. Sain*, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745, the United States Supreme Court held that in *habeas corpus* proceedings instituted by a State prisoner, a Federal district court must hold an evidentiary hearing if the applicant did not receive a full and fair evidentiary hearing in a State court, either at the time of the trial or in a collateral proceeding; a Federal evidentiary hearing is required unless the State-court trier of fact has after a full hearing reliably found the relevant facts. The court went on to say at 372 U.S. 314:

"We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

● 9 Since the defendant did not receive a full evidentiary hearing in the trial court on the voluntariness of his confession, including the rights af-

forded him by *Miranda*, it is apparent that he could obtain such a hearing in the proper Federal district court if his conviction should be sustained by the courts of review of this State.

● 10, 11 This case is remanded to the Circuit Court of St. Clair County for a new full and complete hearing on the admissibility of the defendant's confession. If the confession is held inadmissible, the trial court will vacate the judgment of conviction and grant the defendant a new trial. If the confession is held admissible, the trial court will enter a new judgment of conviction (*People v. Stark*, 33 Ill.2d 616, 623; *People v. Jackson*, 31 Ill.2d 408, 411; *People v. McGuire*, 35 Ill.2d 219), and impose an indeterminate sentence pursuant to the sentencing provisions of the new Code of Criminal Corrections. (Ill. Rev. Stat. (1972 Supp.), ch. 38, par. 1005—8-1(a), (b)(1) and 1008-2-4). *People v. Lobb*, 9 Ill.App. 3d 680, *People v. Mita*, 9 Ill.App3d 617.

Remanded with directions.

EBERSPACHER and JONES, JJ., concur.

APPENDIX B

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDDIE WHITE, Defendant-Appellant.

(No. 73-342; Judgment affirmed.)

Fifth District—September 16, 1974.

1. CRIMINAL PROCEDURE (§ 533.35)—*State need only make prima facie case that confession was voluntary—murder.*

At hearing on motion to suppress defendant's murder confession, it is only necessary that prosecution make out prima facie case that confession was voluntary before defendant is required to present some evidence.

2. CRIMINAL PROCEDURE (§ 501.5)—*when trial court may accept as true officer's testimony that defendant did not ask for attorney.*

Where defendant, at hearing on motion to suppress his murder confession, failed to present any evidence to contradict police captain's testimony that defendant did not ask for lawyer but merely stated that he did not wish to talk to police, trial court could in its discretion accept captain's testimony as true.

3. CRIMINAL PROCEDURE (§ 334)—*defendant's claim that his refusal to talk precluded police from seeking retraction held to be without merit.*

Where there was no evidence that any persistent police exhortations of defendant occurred, defendant's claim that his refusal to talk precluded police from seeking retraction at later time was deemed without merit.

4. CRIMINAL PROCEDURE (§ 733.70)—*objection to State's failure to produce material witnesses to confession cannot be raised for first time on appeal.*

Defendant's failure to object to State's failure to produce material witnesses at hearing on motion to suppress confession precludes entertainment of objection on appeal from a murder conviction (Ill. Rev. Stat. 1971, ch. 38, par. 114—11(d)).

5. CRIMINAL PROCEDURE (§ 964)—*Appellate Court's function in reviewing sentences.*

In reviewing sentence imposed by trial court, it is not Appellate Court's function to determine propriety thereof based on what it might have done but to determine whether trial court exercised proper discretion in deciding upon sentence imposed.

6. HOMICIDE (§ 117)—*sentence upheld upon review where record disclosed no mitigating circumstances murder.*

Where defendant's signed confession described premeditated murder of particularly egregious nature, committed in senseless and cold-blooded manner, record disclosed no mitigating circumstances, and jury that convicted defendant recommended death penalty, defendant's 60 to 198 years penitentiary sentence was not reduced by reviewing court.

C. MORAN, P. J., dissenting.

APPEAL from the Circuit Court of St. Clair County; the Hon. HAROLD O. FARMER, Judge, presiding.

Robert Farrell and Margaret Marwell, both of State Appellate Defender's Office, of Mt. Vernon, for appellant.

Robert H. Rice, State's Attorney, of Belleville (Philip C. Fader, Assistant State's Attorney, of counsel), for the People.

Mr. JUSTICE EBERSPACHER delivered the opinion of the court:

The defendant, Eutues White, was convicted of murder on a jury verdict in the circuit court of St. Clair County and sentenced to the Illinois State Penitentiary for a minimum term of 198 years and a maximum term of 200 years. On direct appeal this court remanded the cause to the trial court for a second evidentiary hearing to determine whether the defendant's confession was properly admitted into evidence and to resentence the defendant pursuant to the new Code of Criminal Corrections. (*People v. White*, 10 Ill.App.3d 914, 295 N.E.2d 300.) Subsequently, the trial court held a second evidentiary hearing to determine the admissibility of the defendant's confession. After determining that the confession was properly admitted into evidence, the trial court entered a new judgment of conviction and imposed a sentence of 60 to 198 years in the penitentiary. The defendant appeals therefrom.

The defendant raises two issues in this appeal: first, that the trial court erred in denying defendant's motion to suppress the confession and second, that the sentence imposed upon him by the trial court was excessive.

The defendant's first allegation of error is in two parts. The defendant contends first that the trial court erred in not suppressing defendant's confession because the evidence introduced at the second hearing on the motion to suppress establishes that the defendant attempted to exercise

his right to remain silent and to have the advice of an attorney and that such attempt was frustrated by the investigating officers. Next, it is asserted that the trial court erred in denying the motion to suppress the confession of the defendant because the State failed to call all material witnesses to the confession.

Only two witnesses testified at the second hearing on defendant's motion to suppress, Detective William Stanis and Captain William Johnson of the East St. Louis Police Department. Detective Stanis testified that the defendant was arrested on May 24, 1969, and that he was advised of his rights at that time. According to Detective Stanis, the defendant did not make a statement on May 24, 1969. Detective Stanis interrogated the defendant on two occasions on May 25, 1969, and he allegedly informed the defendant of his rights on each occasion. When Detective Stanis was asked how the defendant responded when he was informed of his rights for the first time on May 25, the detective stated, "In essence, he waived his rights, that he would talk to me." Next, Detective Stanis answered affirmatively to the question: "At that time did he [defendant] state to you that he wished to make a statement?" The witness then identified "People's Exhibit No. 1" as the statement made by the defendant on the morning of May 25, 1969. The witness testified that the defendant wished to make another statement on the afternoon of May 25, 1969. The witness identified "People's Exhibit No. 2" as that statement.

The two statements made by the defendant on May 25, 1969, pertain to the alleged murders other than the murder charged in the instant case. Detective Stanis stated that the defendant did not make a statement on May 24, or 25, concerning the alleged murder in the instant case.

Detective Stanis questioned the defendant for the third time on May 28, 1969. Detective Stanis testified that the *Miranda* warnings were given, and the defendant then made a statement concerning the charge in the instant case. He stated that the defendant seemed to understand his constitutional rights, that he knowingly chose to waive those rights, that no force, threats or promises were used to induce the defendant to confess and that the defendant never expressed a desire to stop the questioning or to consult an attorney.

Captain William Johnson, Detective Stanis' superior, testified that he talked with the defendant briefly on the day of his arrest, May 24, 1969. Captain Johnson informed the defendant of his rights and asked if he wished to talk. Captain Johnson testified that the defendant said, "he didn't want to talk about it; he would rather see a lawyer." The witness stated on three other occasions on direct examination that the defendant informed him, Captain Johnson, that he would rather talk to a lawyer. After the defendant said that he did not wish to talk, he was placed

III.

back in a cell. Captain Johnson did not know whether the defendant made a phone call or talked to an attorney. Captain Johnson testified that he then turned the case over to Detective Stanis.

After Johnson had been excused as a witness, counsel approached the bench and an unrecorded colloquy took place, the defense counsel then informed the court that the defendant did not wish to testify. The State's Attorney then recalled Captain Johnson to the stand. Captain Johnson then gave the following testimony:

"Q. If someone asked for a lawyer it is the practice of your department to see that they are able to get a lawyer?

A. If he had asked for a lawyer I would have given him the phone there on my desk and let him use the phone.

Q. When you said that he wanted to speak to a lawyer, do you mean that he asked, that he wanted to retain a lawyer?

A. Well, I am not sure this is what the words that he said but he didn't want to talk, so therefore I had him put back in the cell block.

Q. Well, could it have been that you just assumed when you were seeing him that he wanted a lawyer, since he didn't want to talk?

A. Yes.

Q. If he had asked for a lawyer would Detective Standis [*sic*] have been notified of that fact.

A. He would have been, yes.

Q. Would any questioning have proceeded before he was able to talk to one?

A. Not to my knowledge."

On cross-examination, Johnson was asked the following questions and gave the following answers:

"Q. Captain you testified just a moment ago that you talked to Eutues White when he first came in, to see if you knew him—what you knew about him—that he chose not to talk, that he would rather talk to a lawyer; something to that effect is what you said?

A. Well—

Q. This is important. I want to get this straight; did he specifically ask you and say, I want a lawyer; I want to talk to a lawyer?

A. No, he never asked me about he wanted to talk to a lawyer; he didn't want to talk to me, so I would assume that he would rather have a lawyer there present, but he didn't ask for one, if he had he would have used the phone there on my desk.

Q. Now, I know that a lot of what police officers testify to is based upon years of experience in a routine way of doing things, you say, he had asked for a lawyer, I would have let him use my phone; can you say specifically in this case that Eutues White didn't ask for a lawyer?

A. No, he didn't ask for a lawyer."

The State's Attorney then recalled Detective Stanis. He testified that the defendant never asked for an attorney, that if the defendant had requested an attorney, he, Stanis, would have been advised and that if the defendant had requested an attorney, he, Stanis, would not have questioned the defendant further.

This court's decision in the instant case depends upon our interpretation of the foregoing testimony of Captain Johnson. On direct examination, Captain Johnson stated four times that when he informed the defendant of his rights on May 24, 1969, the defendant stated that he did not want to talk and that he would rather talk to a lawyer. After he was recalled as a witness, however, Captain Johnson stated that the defendant did *not* ask for a lawyer but merely stated that he did not wish to talk to the police. Captain Johnson answered affirmatively to the question: "Well, could it have been that you just assumed when you were seeing him that he wanted a lawyer, since he didn't want to talk?"

● 1, 2 It is argued that Captain Johnson's testimony is so contradictory and suspicious that it must be interpreted in the defendant's favor. However, it is only necessary that the prosecution make out a *prima facie* case that the confession was voluntary before the defendant is required to present some evidence. The trial court need not be convinced beyond a reasonable doubt that the confession was voluntary. (*Lego v. Twomey*, 404 U.S. 477, 30 L.Ed.2d 618, 92 S.Ct. 619), and its finding will not be disturbed unless it is contrary to the manifest weight of the evidence. (*People v. Prim*, 53 Ill.2d 62, 289 N.E.2d 601, *cert. denied*, 412 U.S. 918; *People v. Nemke*, 46 Ill.2d 49, 263 N.E.2d 97, *cert. denied*, 402 U.S. 924; *People v. Bunting*, 18 Ill.App.3d 99, 309 N.E.2d 316.) Since the defendant failed to proffer any evidence to contradict Captain Johnson, the trial court could, in its discretion, accept Johnson's testimony as true and, in view of the record before us, we are compelled to do likewise.

● 3 Accepting Johnson's testimony as true we are presented with the question of whether a defendant who manifests his unwillingness to talk may, at a later time, be interrogated again by the police. The defendant cites *United States v. Crisp* (7th Cir. 1970), 435 F.2d 354, for the proposition that "an interrogator cannot seek retraction of the claim of silence after defendant has indicated that he did not wish to talk." Our supreme court was confronted with a factual situation similar to the one presented

in the instant case in *People* v. *Pittman*, 55 Ill.2d 39, 302 N.E.2d 7. Therein the court distinguished *Crisp* in the following manner:

> "In *Crisp* the defendant was subjected to immediate persistent interrogation even after he had indicated he did not wish to answer any questions pertaining to the crime of which he was charged. It is of interest that in *Crisp* defendant's statement, given several months after the improper questioning, was held admissible because defendant was fully informed of his rights." (55 Ill.2d at 55-56.)

The supreme court continued by finding that:

> "In the present case over 24 hours had elapsed between the time that Williams informed police he did not wish to speak and his agreement to give a statement. During this interval there is no evidence of any persistent police exhortations as condemned in *Doss [Doss* v. *Bensinger* (7th Cir. 1972), 463 F.2d 578, *cert. denied*, 409 U.S. 932] and *Crisp*." (55 Ill.2d at 55.)

Thereafter the court held that the trial court did not err in concluding that these statements were voluntarily made. Since there is no evidence that "any persistent police exhortations" of the defendant occurred in the instant case we find no merit in defendant's claim that his refusal to talk precluded the police from seeking a retraction at a later time. See also *United States* v. *Collins* (2nd Cir. 1972), 462 F.2d 792, *People* v. *Brookshaw*, 12 Ill.App.3d 221, 299 N.E.2d 20.

The defendant also contends that the trial court erred in ruling that the confession was admissible because the State failed to call all material witnesses at the second evidentiary hearing on defendant's motion to suppress. The defendant is correct in stating that, as a general rule, where the voluntary nature of a confession is brought into question the State must produce all material witnesses. (*People* v. *Armstrong*, 31 Ill.2d 471, 202 N.E.2d 712.) The defendant is also correct in stating that Captain Cornelius O'Sullivan, a probable material witness in the instant case, was not produced at the second evidentiary hearing on defendant's motion to suppress. It is crucial, however, that the defense did not object to the State's failure to call Captain O'Sullivan in the trial court.

Prior to 1964 the law was uncertain as to whether the defendant had to object, at the hearing on a motion to suppress, to the State's failure to call a material witness. The following provision of the Criminal Code, however, became effective on January 1, 1964:

> "The burden of going forward with the evidence and the burden of proving that a confession was voluntary shall be on the State. Objection to the failure of the State to call all material witnesses on the issue of whether the confession was voluntary must be

made in the trial court." (Ill. Rev. Stat. 1971, ch. 38, par. 114—11 (d).)

The committee comments to that section state, "The second sentence of subsection (d) clarifies a problem of considerable uncertainty in the Illinois cases." S.H.A. ch. 38, § 114—11(d), committee comments, at 215 (1970).

Three of the four cases cited by the defendant were decided prior to 1964. (*People* v. *Williams*, 26 Ill.2d 190, 186 N.E.2d 353; *People* v. *Wright*, 24 Ill.2d 68, 180 N.E.2d 659; *People* v. *Sammons*, 17 Ill.2d 316, 161 N.E.2d 322.) The only post-1964 case cited by the defendant is *People* v. *Armstrong*, 51 Ill.2d 471, 282 N.E.2d 712. That case is distinguished from the instant case, however, since the defense attorney did object to the State's failure to call a material witness in the trial court.

● 4 In *People* v. *Harper*, 127 Ill.App.2d 420, 262 N.E.2d 298, *cert. denied*, 404 U.S. 1062, it was held that the defendant's failure to object to the State's failure to produce a material witness at the hearing on the motion to suppress a confession precluded entertainment of the objection on appeal. Since the defendant in the instant case has failed to advance any reason which would permit circumvention of the foregoing statute we will not entertain his objection to the State's failure to call a material witness which is raised for the first time on review.

The defendant's final contention is that the sentence imposed upon him was excessive. Originally, the trial court imposed a sentence of a minimum of 199 years and a maximum of 200 years in the penitentiary. After remandment the trial court resentenced the defendant to a minimum of 66 years and a maximum of 198 years in the penitentiary.

● 5 In reviewing the sentence imposed by the trial court it is not our function to determine the propriety thereof based on what we might have done. Rather we are to determine whether the trial court exercised proper discretion in deciding upon the sentence imposed. (*People* v. *Taylor*, 33 Ill.2d 417, 211 N.E.2d 673; *People* v. *Moore*, 8 Ill.App.3d 1039, 291 N.E.2d 519.) In *People* v. *Latson*, 5 Ill.App.3d 1100, 284 N.E.2d 438, the court offered the following guidelines for the review of the sentence imposed by the trial court:

> "The power to reduce the punishment imposed by the trial court should be exercised with caution, and this court will not reduce a sentence unless it clearly appears the punishment is a departure from fundamental law, its spirit and purpose, or that the penalty is not proportioned to the nature of the offense. [Citations.]" 5 Ill. App.3d at 1104.

Since the defendant waived a presentence investigation his past criminal record is not before us. Its absence did not preclude the trial court

from considering other factors which are in the record. The defendant's signed confession describes a premediated crime of a particularly egregious nature, committed in a senseless and "cold-blooded" manner. The jury that convicted the defendant in 1969 recommended the death penalty. ● 6 Sentences exceeding that imposed in the instant case have been upheld in severe cases. (*E.g., People v. Malcom*, 14 Ill.App.3d 378, 302 N.E.2d 352; *People v. Richards*, 120 Ill.App.2d 313, 256 N.E.2d 475.) Given the nature of the offense, the manner in which it was committed, and that the record discloses no mitigating circumstances, the sentence imposed by the trial court will not be reduced by this court.

For the foregoing reasons the judgment of the circuit court of St. Clair County is affirmed.

Judgment affirmed.

CREBS, J., concurs.

Mr. PRESIDING JUSTICE GEORGE J. MORAN dissenting:

The majority opinion poses the main question as to whether the trial court could find defendant's confession to be voluntary according to the manifest weight of the evidence. However, the principal question is whether or not the defendant at any time prior to the signing of his statement requested an attorney and if he did, the statement is inadmissible in evidence. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 694, 86 S.Ct. 1602; *United States v. Blair*, 470 F.2d 331; *People v. Turner*, 56 Ill. 2d 201; *People v. Henenberg*, 55 Ill.2d 5.

The record discloses that the defendant is a borderline retardate with an I.Q. of 76, who signed a confession after 3 days of questioning by the police. He asked for an attorney on the morning of the first day of his questioning. The confession was therefore inadmissible.

APPENDIX C

The PEOPLE of the State of Illinois, Appellee,

v.

Estes WHITE, Appellant.

No. 47088.

Supreme Court of Illinois.

Sept. 28, 1975.

Defendant was convicted in the St. Clair County Circuit Court, Harold O. Farmer, J., of murder, and he appealed. The Appellate Court, 10 Ill.App.3d 914, 295 N.E.2d 300, remanded. On remand, the Circuit Court entered a new judgment of conviction, and defendant appealed. The Appellate Court, 22 Ill.App.3d 180, 317 N.E.2d 323, affirmed, and the Supreme Court granted leave to appeal. The Supreme Court, Schaefer, J., held that failure to furnish defendant an attorney when he requested one at time of his arrest did not require exclusion of subsequent confession, where confession was made three days after request and after defendant had been repeatedly admonished as to his rights and waived such rights.

Affirmed.

1. Criminal Law ⇐412.2(1)

Notice of defendant's request for attorney, given to police captain who originally advised defendant of his constitutional rights was imputed to police detective who subsequently questioned defendant.

2. Criminal Law ⇐412.2(3)

Miranda warnings are prophylactic measures designed to guard against infringement of privilege against self-incrimination.

3. Criminal Law ⇐517.2(2).

Failure to furnish defendant an attorney when he requested one at time of his arrest did not require exclusion of subsequent confession, where confession was made three days after request and after defendant had been repeatedly admonished as to his rights and had waived such rights and confessed to other unrelated offenses.

Paul Bradley, First Deputy State Appellate Defender, Chicago (Margaret Maxwell, Asst. State Appellate Defender, of counsel), for appellant.

William J. Scott, Atty. Gen., Springfield, and Robert R. Rice, State's Atty., Belleville (James B. Zagel, Jayne A. Carr, and Brian A. David, Asst. Attys. Gen., of counsel), for the People.

SCHAEFER, Justice.

The defendant, Estes White, was found guilty of murder in the circuit court of St. Clair County, by a jury which, acting under the authority of the statute then in effect, recommended the death penalty. He was sentenced by the judge to imprisonment for a term of not less than 199 nor more than 200 years. On appeal, the Appellate Court, Fifth District, rejected several of the grounds upon which the defendant attacked the judgment, but found that there was "no evidence in the record to indicate that the defendant was or was not given the required *Miranda* warnings prior to any questioning." The case was therefore remanded to the trial court for "a new full and complete hearing on the admissibility of the defendant's confession." 10 Ill.App.3d 914, 295 N.E.2d 300 (1973).

Upon remand, a hearing was conducted. The trial court found that the confession was properly received in evidence, and entered a new judgment of conviction and a new indeterminate sentence in accordance with the Unified Code of Corrections (Ill.Rev.Stat.1973, ch. 38, par. 1001-1-1 *et seq.*) The defendant again appealed. On this appeal a majority of the appellate court held that the trial court did not err in finding that the defendant's oral and written statements were voluntary. (22 Ill.App.3d 180, 317 N.E.2d 323 (1974).) One judge dissented, pointing out that the "record discloses that the defendant is a borderline retardate with an I.Q. of 76" who initially asked for an attorney but then "signed a confession after three days of questioning by the police." It was the opinion of the dissenting judge that the confession should have been excluded under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. We allowed leave to appeal. The only issue before us is the admissibility of the confession.

The defendant was arrested on the morning of May 24, 1969, for an unrelated offense. What then occurred is described in the testimony of Captain Johnson of the East St. Louis police force:

"State's Attorney: Q: To the best of your recollection what were the events that transpired at the time that you met Mr. White on that day?

A: It was brief. I advised him of his rights; I asked him if he would care to talk about whatever the offense was at that time, and he said he didn't want to talk about it; he would rather see a lawyer.

Q: Was he given an opportunity at that time to make a telephone call?

A: Yes—I am not sure—although he was taken from the office there; he was in my office where he could have made a phone call.

Q: He understood then at that point he didn't have to say anything to anybody?

A: That is right.

Q: What was done with him after he said that he didn't wish to make any statement?

A: To my recollection he was placed back in the cell block.

A: Also he was asked if he understood it.

Q: To your knowledge did he express his understanding of that statement?

A: Yes, he said that he would rather see a lawyer.

Q: Do you know of your own knowledge whether he ever talked to a lawyer after that point?

A: No, I don't."

The significant portions of Captain Johnson's testimony on cross-examination are as follows:

"Q: So that you initially talked to him and gave him his rights, and gave him his rights [*sic*], and he said I don't choose to make a statement at this time; I would rather have a lawyer?

A: That is right.

Q: Then did you turn the matter over to detective Stannis [*sic*]?

A: That is right.

* * * * * *

Q: Are you quite certain he said that he wanted a lawyer or he didn't want to make a statement?

A: Yes, that is what he said; I didn't talk to him long.

* * * * * *

Q: Well, is it your testimony he was refused an opportunity to call someone of his choosing or to have someone appoint a lawyer for him?

A: He was refused?

Q: Yes.

A: No, I am not saying he was refused; I am saying one thing: I talked with him; he said that he would rather talk to a lawyer; he didn't want to talk, so then the conversation ceased.

Q: As we know, he was then returned to his cell, I assume?

A: Yes."

Then, after a recess, Captain Johnson was recalled by the prosecutor, and testified:

"Q: If someone asked for a lawyer is it the practice of your department to see that they are able to get a lawyer?

A: If he had asked for a lawyer I would have given him the phone there on my desk and let him use the phone.

Q: When you said that he wanted to speak to a lawyer, do you mean that he asked, that he wanted to retain a lawyer?

A: Well, I am not sure this is what the words that he said but he didn't want to talk, so therefore I had him put back in the cell block.

Q: Well, could it have been that you just assumed when you were seeing him that he wanted a lawyer, since he didn't want to talk?

A: Yes.

Q: If he had asked for a lawyer would Detective Stannis [*sic*] have been notified of that fact?

A: He would have been, yes.

Q: Would any questioning have proceeded before he was able to talk to one?

A: Not to my knowledge.

Q: This is important, I want to get this straight; did he specifically ask you and say, I want a lawyer; I want to talk to a lawyer?

A: No, he never asked me about he wanted to talk to a lawyer; he didn't want to talk to me, so I would assume that he would rather have a lawyer there present but he didn't ask for one; if he had he would have used the phone there on my desk.

Q: Now, I know that a lot of what police officers testify to is based upon years of experience in a routine way of doing things; you say, had he asked for a lawyer, I would have let him use my phone; can you say specifically in this case that Eutes White didn't ask for a lawyer?

A: No, he didn't ask for a lawyer."

Thereafter, the defendant was turned over to Detective Stanis, who questioned him later of May 24 and also during the morning and afternoon of May 25 concerning unrelated offenses. On each of these three occasions, Detective Stanis testified, the *Miranda* warnings were read to the defendant, who said that he understood them. On the morning of May 25 the defendant signed a written confession to one unrelated offense, and on the afternoon of that day he signed another confession to another unrelated offense. On May 25 the defendant was also exhibited in a lineup and his palm print was taken.

At the original hearing on the motion to suppress the confession, Captain O'Sullivan testified that the defendant was advised of his constitutional rights by Detective Stanis, who read "the rights" to him from a card. Captain O'Sullivan was asked:

"Q: Do you recall at this time what was stated in advising this defendant of his rights by your partner?

A: He was advised . . . What was in the card, you mean. He had a right to remain silent. The gist of it was he could have an attorney if he so needed. What he said could and would be used against him.

Q: Was he also advised if he could not afford an attorney, one would be furnished?

A: Yes. He could have one, yes. That is what I said.

* * * * * *

Q: What did he say when you told him he had the right to have an attorney present at the time of this statement?

A: He said he didn't need one."

At that hearing Detective Stanis testified that he "read from a card furnished our Department from the State's Attorney, advising the subject of his rights." The direct examination continued:

"Q: Did you advise him he had the right to have an attorney?

A: Yes sir.

Q: What did he say to that? Did he want an attorney?

A: To be truthful, I can't say exactly what his answer was on that. I don't remember.

Q: Did he tell you he wanted an attorney?

A: No, he did not state he wanted an attorney.

Q: Did you tell him if he did and couldn't afford one, he would be furnished an attorney?

A: Yes, sir.

Q: After you advised him of his right to remain silent, did he state he

would talk to you and wanted to give you a statement?

A: He stated he would talk with us.

Q: He did not refuse to talk to you?

A: No, sir."

On cross-examination of Detective Stanis, the following occurred:

"Q: You said, you seemed to be a little concerned about your answer as to what he said when he was advised of his right to have an attorney before making any statement. You are saying you don't remember what he said. You are pretty sure he didn't or you think he didn't say he wanted one. Could you be more explicit as to what the conversation was?

A: When each point was read to him he was asked if he understood and he said yes. That was one of the points read. He understood it. And he made no comment if he wanted a lawyer."

In our opinion the record establishes that in his interrogation by Captain Johnson, the defendant stated that he desired counsel and did not desire to talk. Captain Johnson's initial testimony on this point was unequivocal, both on direct examination by the prosecutor and on cross-examination by counsel for the defendant. It was only after he was recalled by the prosecution after a recess that his testimony became equivocal and he began to refer to the "practice of the department" and the like. We are unable, therefore, to agree with the view of the majority of the appellate court that "Since the defendant failed to proffer any evidence to contradict Captain Johnson, the trial court could, in its discretion, accept Johnson's testimony as true * * *." (22 Ill.App.3d 180, 184, 317 N.E.2d 323, 326.) In our opinion Johnson's testimony unmistakeably establishes that the defendant requested counsel. The defendant testified that he did not remember any of the interrogations or the signing of the confession.

[1] The record is not clear as to whether or not Detective Stanis was advised that the defendant had told Captain Johnson that he wanted to talk to an attorney. But that is not significant because the notice given to Johnson is imputed to him. "To hold otherwise could make it possible to nullify an accused's request for the assistance of counsel by the expedient of transferring his custody for questioning to an officer who would be unaware of the request for an attorney." *People v. Blanchard* (1967), 37 Ill.2d 69, 73, 224 N.E.2d 813, 816.

The defendant's contention that his confession was erroneously admitted in evidence is based upon *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. In *Miranda* the court stated:

"* * * If [the accused] indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694.

"* * * the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." 384 U.S. 436, 469, 86 S.Ct. 1602, 1625, 16 L.Ed.2d 694.

"* * * If the individual states he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. 436, 474, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694.

[2] The *Miranda* warnings are prophylactic measures designed to guard against infringement of the privilege against self-incrimination. The emphasis upon the right of a suspect to have counsel during custodial interrogation, if he so desires, would seem to be closely associated with the sixth amendment right to counsel which was involved in *Escobedo v. Illinois*

(1964), 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977. From the outset, however, there has been disagreement with what would appear to have been the implicit holding in *Miranda* that the right to counsel attached prior to the making of a formal charge against a defendant. Indeed, dissent from that view appeared in *Escobedo* itself. (See the dissenting opinion of Mr. Justice White, 378 U.S. 478, 495, 84 S.Ct. 1758, 12 L.Ed.2d 977.) Further doubt that there is a sixth amendment constitutional right to counsel before a suspect has been charged with an offense stems from *Kirby v. Illinois* (1972), 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411. There the court refused to accord to an unindicted suspect the right to have counsel present during a lineup—a right which *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, had accorded persons who had been formally charged with an offense. And there the statement that *Escobedo* was to be limited to its own facts was repeated. 406 U.S. 682, 689; see also *Michigan v. Tucker* (1974), 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182.

We therefore consider the case as presenting a violation of the procedural safeguards announced in *Miranda v. Arizona*, and not as involving an infringement of the defendant's constitutional right to counsel. Thus the question presented is whether the record shows circumstances that neutralize the effect of the *Miranda* violation.

In *Brown v. Illinois*, — U.S. —, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the court considered a somewhat similar question: the extent to which *Miranda* warnings might neutralize a prior illegal arrest so that a subsequent inculpatory statement of the defendant might be received in evidence against him. Because the incentive to comply with *Miranda* would be substantially weakened if subsequent warnings were made a cure-all, the court concluded that *Miranda* warnings alone and *per se* will not always break the causal connection between the illegality and the confession. As applied to the case before us, the opinion in *Brown* indicates that repeated *Miranda* warnings do not of themselves dilute the effect of an initial violation.

In the case before us the interrogation that produced the confession did not immediately follow the defendant's request for an attorney. It thus differs from *People v. Hemenberg* (1973), 55 Ill.2d 5, 302 N.E.2d 27. (See also *People v. Turner* (1973), 56 Ill.2d 201, 306 N.E.2d 27.) The confession in this case was not given until May 26. The defendant had been arrested on the morning of May 24, and it was then that he had said that he would prefer to speak to an attorney before talking to Captain Johnson. At that time interrogation ceased. On the afternoon of the 24th he was again given *Miranda* warnings and was questioned by Detective Stanis about other offenses. Either on that date or on May 25 he participated in a lineup and his palm print was taken. On May 25 he was not questioned at all concerning the offense involved in this case, but he was interrogated during that morning with respect to an unrelated offense to which he confessed. In connection with that interrogation he was given the full *Miranda* warnings. During the afternoon of the 25th he was interrogated with respect to still another offense, also unrelated. Again that questioning was preceded by *Miranda* warnings which Detective Stanis testified the defendant understood. Thereafter he signed a confession with respect to that offense.

There was no questioning with respect to the offense here involved until May 26. In the morning of that day, after having again been given full *Miranda* warnings, the defendant signed the confession involved in this case.

What we have, then, is a *Miranda* violation which resulted from the failure of the police department to furnish the defendant

a lawyer when he said he wanted to talk to one. The reason for this failure is not altogether clear, although the testimony of the officers suggests that they felt under no obligation to take any steps toward furnishing an attorney unless the defendant named a specific attorney to whom he wished to talk. The defendant testified at the trial that he had only a vague recollection that he had been held at the police station for some days about the time that his confession was obtained; he had no recollection of being interrogated or of signing any confessions.

The situation is not an easy one to appraise. The defendant's I.Q. was low. On the other hand, there was testimony by the interrogating officer that he understood the *Miranda* "rights" when they were read to him. This was not the first time that the defendant had been charged with a crime, nor was May 24 the first time he had been given *Miranda* warnings. The impact upon the defendant of the lineup in which he participated, and of the taking of his palm print, is not apparent from the record before us, but there is no reason to believe that it would be favorable to the defendant. In this case there is no claim of police brutality. It is not suggested that the defendant's sleep was interfered with during the two nights that he was held in custody prior to his confession of the present crime.

The successive warnings in this case each concerned a separate offense, and the record shows that the officers proceeded in this way in order to obtain in each instance a confession that related to a single offense. Although the total period of interrogation was unduly prolonged, a number of very serious offenses were involved and the defendant was interrogated separately as to each offense.

[3] While the case is a close one, we are of the opinion that the effect of the procedural violation of the *Miranda* standards was sufficiently dissipated by lapse of time, repeated admonitions and other intervening events so that the defendant's confession was voluntary and was therefore properly received in evidence.

The judgment of the Appellate Court, Fifth District, is therefore affirmed.

Judgment affirmed.

APPENDIX D

Estes WHITE, Petitioner-Appellant,

v.

Fred FINKBEINER,
Respondent-Appellee.

No. 77-1634.

United States Court of Appeals,
Seventh Circuit.

Argued April 26, 1977.
Decided Feb. 1, 1978.

Illinois prisoner petitioned for a writ of habeas corpus, asserting that his constitutional rights were violated by the admission at trial of a confession allegedly coerced by custodial interrogation that proceeded after he had asked to consult with an attorney. The United States District Court for the Southern District of Illinois, Robert D. Morgan, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) in view of petitioner's allegation, which was believed by the Illinois Supreme Court, that he asked to see an attorney on the first occasion he was questioned at police station,

the petition stated a legally sufficient claim to relief under *Miranda v. Arizona*, and (2) because the Illinois trial court failed to make essential findings of historical fact as to whether petitioner asked to see an attorney during his initial conversation with police and where the record itself permitted no reconstruction of the court's view of the underlying facts, the trial court's general finding that petitioner's confession was voluntary was required to be set aside and the matter remanded for a new evidentiary hearing.

Reversed and remanded.

1. Habeas Corpus ⇐54

Illinois state prisoner's petition appeared to state a legally sufficient claim to habeas corpus relief under *Miranda v. Arizona* where petition alleged that petitioner had asked to see an attorney on first occasion he was brought to police station and questioned but that police nevertheless proceeded with custodial interrogation. 28 U.S.C.A. § 2254(d).

2. Criminal Law ⇐412.2(5)

Where a purported waiver of the right to counsel was solicited in the course of custodial interrogation initiated by police following an accused's unhonored request for counsel, such solicited waiver is properly viewed with skepticism. U.S.C.A.Const. Amend. 5.

3. Habeas Corpus ⇐85.1(2)

Findings of fact made by state court are entitled to a presumption of correctness in habeas corpus proceeding; however, that presumption generally attaches only to determinations of historical fact made by a judge who heard the evidence. 28 U.S.C.A. § 2254(d); U.S.C.A.Const. Amend. 5.

4. Habeas Corpus ⇐90

Recitals of fact contained in a state appellate court opinion which are unsupported by any specific findings of trial court judge who observed witnesses are usually not dispositive of contested factual issues raised in a federal habeas corpus proceeding; this is certainly true where resolution of a controlling factual issue depends largely on an interpretation of the self-contradictory testimony of a single witness and on an assessment of that witness' credibility. 28 U.S.C.A. § 2254(d).

5. Habeas Corpus ⇐90, 113(13)

Where Illinois trial court failed to make essential findings of historical fact as to whether habeas corpus petitioner asked to see an attorney in the course of his initial conversation with police and where record itself permitted no reconstruction of the trial court's view of the underlying facts, trial court's general finding that petitioner's confession was voluntary was required to be set aside for purposes of federal habeas corpus proceeding and matter was remanded for relitigation of that issue and any relevant subsidiary factual issues.

6. Criminal Law ⇐412.2(4)

If habeas corpus petitioner did ask to see an attorney at any time while he was in custody, *Miranda* would require suppression of any statement thereafter obtained from petitioner, at least absent a finding that he later voluntarily retracted his request for counsel and effected a knowing and intelligent waiver of his *Miranda* rights. U.S.C.A.Const. Amend. 5.

7. Criminal Law ⇐517.3(3)

Fact that suspect may have been readvised of his *Miranda* rights prior to interrogation would not necessarily dispel the potentially coercive impact of state law enforcement authorities' refusal to honor suspect's initial request for counsel, for purpose of determining whether subsequent confession was voluntary. U.S.C.A.Const. Amend. 5.

James Geis, Deputy State Appellate Defender, Kenneth L. Jones, Asst. Defender, Chicago, Ill., for petitioner-appellant.

William J. Scott, Atty. Gen., Dale M. Bennett, Asst. Atty. Gen., Chicago, Ill., for respondent-appellee.

Before TONE, BAUER and WOOD, Circuit Judges.

BAUER, Circuit Judge.

Eutues White appeals here from the district court's denial of his petition for a writ of habeas corpus, which asserts that his constitutional rights were violated by the admission at trial of his confession to a murder allegedly coerced by custodial interrogation that proceeded after he had asked to consult with an attorney. White claims that the custodial interrogation leading to his confession violated the procedural requirements announced in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that suppression of his confession was mandated for that reason alone. In addition, his petition puts in issue the voluntariness of his confession, a matter previously decided against him in the state courts. White contends that the district court erred in dismissing his petition without an evidentiary hearing and asks that we either grant him a writ of habeas corpus or remand the case for litigation of the issues raised by his petition.

For the reasons noted below, we reverse the district court's summary denial of White's petition and remand the case for further proceedings.

I.

Following a jury trial in the Circuit Court of St. Clair County, Illinois, White was convicted of murder largely on the basis of his confession and testimony concerning his reenactment of the crime following his confession. The admissibility of the confession at trial is the central question presented by this appeal and was the subject of extensive hearings in the state courts, a review of which follows.

Prior to trial, White moved to suppress his confession on the ground that it was "illegally and improperly obtained and procured." At the hearing on White's motion, the interrogating officers testified that they had orally advised White of his *Miranda* rights immediately prior to questioning him, that he appeared to understand those rights, and that he voluntarily waived them. The officers also testified that no force or duress was used in the course of their interrogation, and that no promises of leniency or other benefits were made to induce White's confession. The confession, which was typed up by an officer and signed by White, contained both a statement of the details of the murder and a full description of White's rights under the *Miranda* decision and written waiver thereof. White himself did not testify at the hearing, and his counsel introduced no evidence to controvert the officers' testimony. At the end of the hearing, the trial court summarily ruled that "the motion to suppress the confession is denied." No other findings of fact or conclusions of law were stated by the court.

At trial, the officers reiterated the testimony they had given at the suppression hearing, and the confession was received into evidence over the defendant's objection that there was insufficient evidence of record showing that he had been adequately advised of his rights and had voluntarily waived them. White himself testified at trial that he could not remember signing the confession or even being interrogated. All he could recall was that he had been held at a police station for several days.

On appeal, the state appellate court remanded the case so that a full evidentiary hearing on the voluntariness of White's confession could be held. The appellate court deemed the record inadequate both because the trial court had failed to make any findings of fact or conclusions of law regarding the voluntariness of White's confession, and because the record was silent as to whether White was advised of his *Miranda* rights prior to the outset of the interrogation leading to his confession. Because White's confession was obtained on the third day of incarceration following his arrest and he had been questioned on a number of occasions prior to the interrogation that resulted in his confession, the court deemed the record's silence as to White's receipt of earlier *Miranda* warnings to be a serious deficiency. Accordingly, the court remanded the case for a "new full and complete hearing on the admissibility of the [defendant's] confession." *People* v. *White*, 10 Ill.App.3d

914, 923, 295 N.E.2d 300, 306 (5th Dist. 1973).

At the hearing held pursuant to the appellate court's remand, the sequence of events leading to White's confession became clearer. White was arrested on May 24, 1969, early in the morning. After he arrived at the stationhouse, he was taken to see the Watch Commander, Captain William Johnson. Following a brief conversation with Johnson—the contents of which are in dispute here—White was placed in a cell, and his case was turned over to Detective Stanis for investigation.

Stanis testified at the hearing that he placed White in a lineup on the morning of the 24th and took White's palm prints that afternoon. According to Stanis, White was not interrogated about any crimes that day. On the morning of the 25th, Stanis questioned White about a murder unrelated both to the crime for which he was arrested and to the case at bar. Prior to the interrogation, Stanis orally advised White of his *Miranda* rights from a card supplied by the State's Attorney's office. White waived his rights and confessed to the murder. His confession was reduced to writing and signed by petitioner. It also contained a description and signed waiver of his *Miranda* rights. Later that afternoon, Stanis questioned White about another murder after again orally advising him of his rights prior to interrogation. White admitted committing that murder as well, and his signed confession again contained a written waiver of his *Miranda* rights. On the morning of the 26th, Stanis questioned White about the murder that resulted in the confession at issue here. The record does not reflect whether White was ever interrogated about the crime for which he was arrested.

Following Stanis's testimony, Captain Johnson, who had not testified at the initial suppression hearing, took the stand. On direct examination, Johnson said that he had advised White of his rights when the petitioner was brought to see him on the morning of his arrest. Johnson then asked White if he wished to talk about the charge for which he was arrested. According to Johnson's initial testimony, White replied that he did not want to talk and "would rather see a lawyer." At four times during his testimony, Johnson stated that White said, "[I'd] rather see a lawyer." Indeed, this was one of the reasons why Johnson believed that White fully understood his rights.

After Johnson had been excused as a witness, counsel approached the bench, and an unrecorded colloquy took place. After the colloquy, defense counsel informed the court that the defendant did not wish to testify. The State's Attorney then recalled Johnson to the stand, and he gave the following testimony:

"Q. If someone asked for a lawyer is it the practice of your department to see that they are able to get a lawyer?

A. If he had asked for a lawyer I would have given him the phone there on my desk and let him use the phone.

Q. When you said that he wanted to speak to a lawyer, do you mean that he asked, that he wanted to retain a lawyer?

A. Well, I am not sure this is what the words that he said but he didn't want to talk, so therefore I had him put back in the cell block.

Q. Well, could it have been that you just assumed when you were seeing him that he wanted a lawyer, since he didn't want to talk?

A. Yes.

Q. If he had asked for a lawyer would Detective Stanis have been notified of that fact?

A. He would have been, yes.

Q. Would any questioning have proceeded before he was able to talk to one?

A. Not to my knowledge."

On cross-examination, Johnson testified:

"Q. Captain, you testified just a moment ago that you talked to Eutues White when he first came in, to see if you knew him—what you knew about him—that he chose not to talk, that he would rather talk to a lawyer; something to that effect is what you said?

A. Well—

Q. This is important, I want to get this straight, did he specifically ask you and say, I want a lawyer, I want to talk to a lawyer?

A. No, he never asked me about he wanted to talk to a lawyer, he didn't want to talk to me, so I would assume that he would rather have a lawyer there present, but he didn't ask for one; if he had he would have used the phone there on my desk.

Q. Now, I know that a lot of what police officers testify to is based upon years of experience in a routine way of doing things; you say he has asked for a lawyer, I would have let him use my phone, can you say specifically in this case that Eutues White didn't ask for a lawyer?

A. No, he didn't ask for a lawyer."

The State's Attorney then recalled Detective Stanis, who testified that at no time during his interrogations of White did the petitioner ask to see an attorney or request that questioning be terminated. Stanis also testified that, under standard operating procedure, if White had asked Johnson to provide an attorney, he, Stanis, would have been so advised and would not have questioned White further.

Following Stanis's testimony, the defense rested, and the trial court found—without entertaining any argument from counsel—that "the defendant was properly admonished." The court then asked if counsel believed that was sufficient, and the State's Attorney replied that "the Appellate Court—they asked if the confession was found to be properly admissible in terms of voluntariness." After reading the appellate court's opinion, the trial court then stated:

> "It is the finding of the Court that the confession was voluntary, proper, and admonitions given to the defendant under the *Miranda* ruling, and that the confession is admissible, all as per order signed by the Court."

Thereafter, the court entered judgment on the jury's verdict and resentenced White to not less than 60 years' and not more than 180 years' imprisonment.

White then appealed the trial court's ruling on the ground that the evidence presented at the hearing conclusively established that his initial efforts to exercise his rights to remain silent and to the assistance of counsel were frustrated by the subsequent custodial interrogations. White argued that Johnson's testimony was so contradictory and suspicious that it had to be interpreted in White's favor. A majority of the appellate court believed, however, that because White failed to proffer any evidence to contradict Johnson's final testimony that White never asked for an attorney, the trial court could accept that testimony as true, and that "finding" could not be disturbed on appeal as it was not contrary to the manifest weight of the evidence. *People v. White*, 22 Ill.App.3d 180, 184, 317 N.E.2d 323, 326 (5th Dist. 1974). Accordingly, viewing the case as presenting only a question of whether a defendant who manifested an initial unwillingness to talk could be interrogated at a later time after having been readvised of his rights and having waived them, the court determined that the officers' subsequent interrogations did not render White's confession involuntary. *Id.* at 184–85, 317 N.E.2d at 326–27. One justice dissented because he believed the record established that White had asked for an attorney during his first custodial interrogation by Captain Johnson. That being the case, the justice viewed the subsequent statements obtained in the absence of counsel to be inadmissible under *Miranda*. *Id.* at 187, 317 N.E.2d at 329.

On appeal, the Illinois Supreme Court adopted the dissenting justice's view of the record with respect to whether White had asked for an attorney. The court reasoned:

> "Johnson's initial testimony on this point was unequivocal, both on direct examination by the prosecutor and on cross-examination by counsel for the defendant. It was only after he was recalled by the prosecution after a recess that his testimony became equivocal and he began to refer to the 'practice of the department' and the like. We are unable, therefore,

to agree with the view of the majority of the appellate court that 'Since the defendant failed to proffer any evidence to contradict Captain Johnson, the trial court could, in its discretion, accept Johnson's testimony as true * * *.' In our opinion Johnson's testimony unmistakably established that the defendant requested counsel." *People v. White*, 61 Ill.2d 288, 293-94, 335 N.E.2d 457, 461 (1975).

The court went on to view the case as presenting a question of whether the circumstances surrounding the procurement of White's confession neutralized the effect of the *Miranda* violation established by Johnson's self-contradictory testimony. The court held that,

> "[w]hile the case is a close one, we are of the opinion that the effect of the procedural violation of the *Miranda* standards was sufficiently dissipated by lapse of time, repeated admonitions and other intervening events so that the defendant's confession was voluntary and was therefore properly received in evidence." *Id.* at 297, 335 N.E.2d at 463.

Following the Illinois Supreme Court's decision, White filed a petition for a writ of certiorari with the United States Supreme Court, which was denied. *White v. Illinois*, 434 U.S. 970, 98 S.Ct. 1469, 47 L.Ed.2d 738 (1976). White then sought relief in the district court by way of a petition for a writ of habeas corpus. The district court ruled that,

> "[i]n light of the Illinois Supreme Court's determination after a prior special hearing, and the presumptive correctness of the facts found by that court after hearing, 28 U.S.C. § 2254(d), it is not necessary to issue an order to show cause to determine that relief is not available. It appears from this application that the petitioner is not entitled to habeas relief." *White v. Finkbeiner*, No. P CIV 76-104 at 2 (E.D.Ill.1976) (memorandum decision and order).

II.

On appeal here, White argues that, assuming the correctness of the facts found by the Illinois Supreme Court, he is entitled to relief as a matter of law. According to White, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as applied by this Court in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), mandates the suppression of any uncounseled statements taken from a suspect following custodial interrogation that proceeded after the suspect had requested the assistance of counsel. As the Illinois Supreme Court found that the record "unmistakably establishes that [White] requested counsel" during his initial questioning by Johnson, White concludes that he is entitled to relief as a matter of law.

The State responds: (1) that the rationale of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), should be extended to bar petitioner from obtaining federal habeas corpus relief on the basis of alleged *Miranda* violations already fully and fairly litigated in state court proceedings. (2) that an independent examination of the state court record will reveal that White never asked for an attorney at any time while he was held in custody; (3) that, under *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), White's initial election to remain silent in response to interrogation about the crime for which he was arrested did not preclude further questioning of him about other crimes after readmonition of his rights; and (4) that, even assuming arguendo that White asked to see counsel before discussing the crime for which he was arrested, his confession to another offense could still be deemed voluntary and admissible in view of the subsequent waiver of his *Miranda* rights upon readmonition.

III.

[1, 2] We believe that the district court erred in summarily denying White's petition as legally insufficient to state a claim to habeas relief. If it is true, as the petition alleges and the Illinois Supreme Court believed, that White asked to see an attorney on the first occasion he was questioned

when brought to the stationhouse, then the petition would appear to state a legally sufficient claim to relief under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as applied in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248, 1252 (7th Cir. 1972).[1] This is not to say, however, that White is inevitably entitled to relief even if he did ask for an attorney, for a forceful argument can be made from *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), that federal habeas relief should be unavailable to petitioners whose voluntary confessions were tainted by violation of the procedural rules announced in *Miranda*.[2] Moreover, the State's request that we either overrule or distinguish our *Williams* decision insofar as it suggests that the right to the assistance of counsel can *never* be waived by a suspect whose initial request for an attorney had not been honored is not an argument lightly to be dismissed in the circumstances of this case.[3] We leave those argu-

1. In *Miranda* the Court appears to have set out a per se rule barring any custodial interrogation of a suspect after a request for counsel has been made. The Court said:

> "If the individual states that he wants an attorney, the interrogation 'must cease *until an attorney is present*. At that time, the individual must have an opportunity to confer with the attorney and to have him present during *any* subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.'" 384 U.S. at 474, 86 S.Ct. at 1628 (emphasis added).

In *Williams*, at least, we have construed the Court's above remarks as requiring the suppression of any statement obtained after a request for counsel had been made and not yet honored. See 467 F.2d at 1252.

Nothing in *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), appears to require a retreat from that view. *Mosley* is distinguishable from the case before us because here, unlike in *Mosley*, the petitioner has alleged that he not only invoked his right to remain silent during his first custodial interrogation, but also asked to see an attorney. See 423 U.S. at 101 n.7, 96 S.Ct. 321. As Mr. Justice White noted in his concurrence to *Mosley*,

> "the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." 423 U.S. at 110 n.2, 96 S.Ct. at 329.

2. Such an argument assumes, of course, that a statement obtained in violation of the procedural rules announced in *Miranda* is not per se "involuntary" in traditional terms, and that is not necessarily obtained in violation of the suspect's Fifth Amendment right not to be "compelled" to incriminate himself. Although that assumption appears to be well founded in light of the Court's discussion of *Miranda* in *Michigan v. Tucker*, 417 U.S. 433, 443–46, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), and other recent cases, any argument seeking to extend the rationale of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), to *Miranda* violations, standing alone, must take into account the distinct purposes served by the use of an exclusionary rule in the Fourth Amendment context from the purposes served by excluding statements taken in violation of *Miranda*. See, e. g., *Stone v. Powell*, *supra* at 496–97, 96 S.Ct. 3037 (Burger, C. J., concurring); *Schneckloth v. Bustamonte*, 412 U.S. 218, 240–42, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). See generally, Chase, *The Burger Court, The Individual, and The Criminal Process: Directions and Misdirections*, 52 N.Y.U.L.Rev. 518 (1977).

Because the applicability of the *Stone* rationale to *Miranda* claims raised in federal habeas proceedings has been argued only as an afterthought in prior appeals, we have no fair decision to address the question. *United States ex rel. House v. Fike*, 563 F.2d 809, 812 (7th Cir. 1977). As the Supreme Court noted in *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506 n.11, 53 L.Ed.2d 594 (1977), however, the question remains open.

3. Unrebutted waivers of the right to the assistance of counsel following a request for counsel that had not yet been honored have been upheld by a number of courts. E. g., *United States v. Tafoya*, 489 F.2d 434, 437 (10th Cir. 1973); *People v. Morgan*, 67 Ill.2d 1, 7 Ill.Dec. 69, 364 N.E.2d 56 (1977). However, we are unaware of any decision, apart from the Illinois Supreme Court's in the instant case, which has upheld the validity of a waiver of the right to counsel solicited in the course of custodial interrogation initiated by the police following an accused's unhonored request for counsel. Such solicited waivers, as Mr. Justice White noted in *Mosley*, are "properly viewed with skepticism." 423 U.S. at 110 n.2, 96 S.Ct. 321

ments for another day, however, for the State disputes that White ever asked Johnson to provide counsel, and until that question of fact is reliably resolved any further discussion of the other issues raised by the parties would be premature.

[3, 4] We recognize, of course, that the Illinois Supreme Court concluded that White asked for an attorney, and that state court findings of fact are entitled to a presumption of correctness in this habeas proceeding. 28 U.S.C. § 2254(d). That presumption, however, generally attaches only to determinations of historical fact "made by the judge who heard the evidence, for only he is in a position to evaluate the credibility of the witnesses." *Hill v. Nelson*, 466 F.2d 1346, 1348 (9th Cir. 1972). Recitals of fact contained in a state appellate court opinion unsupported by specific findings made by the trial court judge who was able to test the credibility of witnesses by observing their demeanor in the course of direct and cross-examination are usually not dispositive of contested factual issues raised in a federal habeas proceeding. See e. g., *Elliott v. Morford*, 557 F.2d 1228, 1231–32 (6th Cir. 1977). This is certainly true at least where, as here, resolution of a controlling factual issue depends largely upon one's interpretation of the self-contradictory testimony of a single witness and an assessment of his credibility.

[5, 6] Unfortunately, the state trial court failed to make any finding as to whether White asked to see an attorney in the course of his initial conversation with Captain Johnson. The failure to make a "reliable and clear-cut" determination of this subsidiary issue of fact bearing on the voluntariness of White's confession regrettably necessitates a new evidentiary hearing, *Jackson v. Denno*, 378 U.S. 368, 390–91, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1963), for we are unable to ascertain from the record the factual and legal bases upon which the state trial court resolved the voluntariness issue. As the record stands, we can only speculate as to whether the court found White's confession voluntary because he never asked for counsel and waived his rights thereto, or because the court, as did the Illinois Supreme Court, believed that the confession's voluntariness was not impaired by the failure to honor a request for counsel. Thus, in the circumstances of this case, where the state trial court failed to make essential findings of historical fact and the record itself permits no reconstruction of the court's view of the underlying facts, the trial court's general finding of the voluntariness of White's confession must be set aside for purposes of this federal habeas proceeding, and the case must be remanded for relitigation of that issue and any relevant issues of subsidiary fact bearing upon it. E. g., *Outing v. North Carolina*, 344 F.2d 105, 106–07 (4th Cir. 1965).

[7] Central to the resolution of this case on remand, of course, is the factual question of whether White asked Johnson for an attorney in the course of his initial interrogation at the stationhouse.[4] If the court finds that White did not ask for an attorney, that he was properly advised of his *Miranda* rights, that he intentionally waived them, and that his confession was voluntary, his petition should naturally be denied. On the other hand, should the court find that White did ask to see an attorney at any time he was held in custody, *Miranda* would require suppression of any statement thereafter obtained from White, at least absent a finding that he later voluntarily retracted his request for counsel and effected a knowing and intelligent waiver of his *Miranda* rights. The

(concurring opinion). It need not now be decided whether this Court should reconsider in an appropriate case the question of whether the "heavy burden" of showing the voluntariness of any such waiver is necessarily an "impossible" one. *See United States ex rel. Williams v. Twomey*, *supra* at 1284 (Pell, J., dissenting).

4. Our review of Captain Johnson's testimony at the second suppression hearing held by the state trial court reveals that another officer who did not testify at the hearing was present during Johnson's conversation with White. Efforts should be made to obtain his testimony at the hearing held on remand.

State, of course, would bear a "heavy" burden of showing the voluntary character of any subsequent waiver,[5] and efforts to solicit such a waiver from petitioner should be viewed with suspicion.[6] Moreover, should the court find that White asked for counsel and yet that his confession was "voluntary" in traditional terms,[7] factual findings regarding the interrogating officers' good faith and their awareness of any violations of the procedural guarantees announced in *Miranda*[8] would naturally be relevant to any disposition of the State's argument that the rationale of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), should be extended to bar federal habeas relief in the circumstances of this case.

In any event, the court should give scrupulous care to setting out its findings of fact and conclusions of law on the record. Moreover, to insure disposition of all the relevant issues of subsidiary fact bearing on the confession's voluntariness, it would be advisable for the court to allow counsel to submit a list of contested factual issues prior to any judicial ruling.

For the reasons noted above, we reverse the district court's dismissal of White's petition and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

5. The fact that White was readvised of his *Miranda* rights prior to interrogation would not necessarily dispel the potentially coercive impact of the authorities' refusal to honor his initial request for counsel. Cf. *Brown v. Illinois*, 422 U.S. 590, 600-04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

6. E. g., *United States v. Clark*, 499 F.2d 802 (4th Cir. 1974).

7. E. g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S.Ct.

APPENDIX E

Estuss WHITE, Petitioner-Appellant,
v.
Fred FINKBEINER,
Respondent-Appellee.

No. 79-1563.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 13, 1979.

Decided Dec. 7, 1979.

Rehearing and Rehearing In Banc
Denied Feb. 15, 1980.

Illinois prisoner petitioned for writ of habeas corpus, asserting that his constitutional rights were violated by admission at trial of confession allegedly coerced by custodial interrogation that proceeded after he had asked to consult with attorney. The United States District Court for Southern District of Illinois, Robert D. Morgan, J., Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, 570 F.2d 194, reversed and remanded. On remand, the district court again denied relief, and petitioner appealed. The Court of Appeals, Swygert, Circuit Judge, held that: (1) *Miranda* and *Mosley* do not create a per se rule prohibiting a waiver and a resumption of questioning of a suspect after counsel is requested, and (2) defendant's in-custody statement to noninvestigating officer to effect that "I'd rather see an attorney" constituted request for counsel, but defendant subsequently waived that request where he stated, two days later, that "I don't need a lawyer," defendant was given his *Miranda* warnings before each subsequent interrogation by investigating officers, who understandably were never informed of defendant's prior request for counsel, defendant signed written waiver of his rights, and defendant signed confession.

Affirmed.

Harlington Wood, Jr., Circuit Judge, filed concurring opinion.

was not defined and punished by the federal statute entitled "[a]ssault with intent to commit murder."

1. Habeas Corpus ⇐113(12)

In habeas corpus proceeding in which prisoner asserted that his constitutional rights were violated by admission at trial of confession allegedly coerced by custodial interrogation that proceeded after he had asked to consult with attorney, whether statements made were actually request for counsel was legal determination, and thus district court's finding on this matter was not due same deference as findings of fact. 28 U.S.C.A. § 2254; U.S.C.A.Const. Amend. 5.

2. Criminal Law ⇐412.2(5)

Miranda teaches that request for counsel need not be explicit, but, rather, it must be determined if there was indication "in any manner" that accused desired to consult with attorney. U.S.C.A.Const. Amend. 5.

3. Criminal Law ⇐412.2(5)

Prosecution contended that focus of inquiry should be on totality of circumstances in which defendant uttered to police officer in-custody statement to effect that "I'd rather see an attorney," i. e., that such officer was not investigating case and spoke to defendant for only short time, and district court agreed and concluded that under circumstances, officer's conclusion that attorney was not requested was reasonable, but Court of Appeals rejected application of this approach to facts before it, as such approach placed too much emphasis on subjective interpretation of officer and ignored import of words uttered by defendant. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇐412.2(4)

Miranda and *Mosley* do not construct a per se rule requiring that there can be no questioning of a suspect after counsel is requested; such cases do not create a per se rule prohibiting a waiver and a resumption of questioning. U.S.C.A.Const. Amend. 5.

5. Constitutional Law ⇐43(1)

General test for waiver of an individual's constitutional right is whether government has shown an intentional relinquishment or abandonment of a known right or privilege.

6. Criminal Law ⇐517.2(2)

Besides consideration of background, experience, and conduct of accused, courts, in determining if request for counsel has been waived, attempt to focus on other factors, such as whether suspect initiated contact which led to statement being made, but there is no reason to conclude that as a prerequisite to a waiver, suspect must have always initiated contact with police, as there may be instances where for some valid reason police must contact accused, and a confession follows this contact. U.S.C.A.Const. Amend. 5.

7. Criminal Law ⇐412.2(5)

Fact that police initiated contact with defendant did not prohibit showing that defendant had waived original request for counsel, where investigating officers' decision to subject defendant to interrogation was made without any knowledge of defendant's prior request for counsel, given fact that such request was offhand request to noninvestigating officer that was understandably not passed on to investigating officers. U.S.C.A.Const. Amend. 5.

8. Criminal Law ⇐412.2(5)

A factor which can indicate that a request for counsel has been waived is time delay between original request and interrogation, since a time lapse gives suspect time to reconsider his prior decision and evaluate situation without presence or prodding of officials. U.S.C.A.Const. Amend. 5.

9. Criminal Law ⇐412.2(5)

Defendant's in-custody statement to noninvestigating officer to effect that "I'd rather see an attorney" constituted request for counsel, but defendant subsequently waived that request where he stated, two days later, that "I don't need a lawyer," defendant was given his *Miranda* warnings before each subsequent interrogation by investigating officers, who understandably were never informed of defendant's prior request for counsel, defendant signed written waiver of his rights, and defendant signed confession. U.S.C.A.Const. Amend. 5.

Kenneth L. Jones, Asst. State Appellate Defender, Ralph Ruebner, Deputy Appellant Defender, Chicago, Ill., for petitioner-appellant.

Kathleen M. Lien, Asst. Atty. Gen., Chicago, Ill., for respondent-appellee.

Before SWYGERT, SPRECHER, and WOOD, Circuit Judges.

SWYGERT, Circuit Judge.

Petitioner-appellant Eutues White appeals from the judgment of the district court which denied his claim for habeas corpus relief under 28 U.S.C. § 2254. The basis of White's petition is that a confession admitted at his murder trial was obtained in violation of his rights under the Fifth Amendment as interpreted in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, White contends that the interrogation which led to his confession occurred after he had made a request for counsel. The issues presented for decision are whether White made a request for counsel and if so, whether this request was waived. We hold that a request for counsel was made, but that this request was waived.

I

White was convicted by a jury of murder,[1] with the prosecution relying primarily upon his confession. At a suppression hearing held prior to trial, White challenged the admissibility of this confession. The trial court denied the motion.

On appeal, the Illinois Appellate Court ordered that a new suppression hearing be held.[2] This hearing was held and the confession was again found to be admissible.[3] On appeal, the Illinois Appellate Court affirmed this judgment.[4] The Illinois Supreme Court affirmed this decision[5] and the United States Supreme Court denied certiorari.[6]

Thereafter, White petitioned the district court for a writ of habeas corpus. Without holding a hearing, the district court denied the application for a writ. On appeal, this court remanded for an evidentiary hearing to determine: 1) whether the appellant requested counsel when he was in custody, 2) whether there was a waiver of the request for counsel, 3) whether the officers acted in good faith in obtaining the confession, 4) whether the reasoning of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 precludes federal habeas corpus relief.[7]

On remand the district court held an evidentiary hearing. The district court made findings of fact and conclusions of law. The district court concluded that White did not make a request for counsel. At most, the district court found that White stated that "I'd rather see an attorney."[8] The district court also found that the confession was voluntary. Because no violation of petitioner's rights was found the district court declined to decide whether *Stone v. Powell* precludes habeas corpus relief for violations of the *Miranda* rules. We affirm the judgment of the district court but do so on different grounds. We conclude that a re-

1. The trial judge sentenced White to not less than 199 years but not more than 300 years. Originally, the jury had recommended that the death sentence be imposed. However, the trial judge chose not to impose that sentence.

2. The appellate court remanded for a determination of whether *Miranda* rights were given. *People v. White*, 10 Ill.App.3d 914, 295 N.E.2d 269 (1973).

3. White was resentenced to not less than 85 nor more than 199 years.

4. *People v. White*, 22 Ill.App.3d 169, 317 N.E.2d 269 (1974).

5. *People v. White*, 61 Ill.2d 288, 335 N.E.2d 457 (1975).

6. *White v. Illinois*, 424 U.S. 970, 96 S.Ct. 1469, 47 L.Ed.2d 738 (1976).

7. *White v. Finkbeiner*, 570 F.2d 194 (7th Cir. 1978).

8. The Illinois Supreme Court held that White did indeed request counsel but nonetheless found that the confession was admissible. The court stated that "[The] testimony unmistakably established that the defendant requested counsel." The district court disagreed with this conclusion in its finding of fact.

quest for counsel was made but that White waived this request.[9]

II

White was arrested in East St. Louis, Illinois on May 24, 1969. The arrest was for an offense unrelated to the murder for which he was eventually convicted. It appears that the arrest occurred sometime in the morning. After arriving at the police station, a Captain Johnson read White his *Miranda* rights. At this time a short conversation occurred between Johnson and White. Apparently Johnson sought to determine if he knew White and also asked White if he wanted to talk about why he was in custody. The exact words are not certain, but White responded in substance that "I'd rather see an attorney."[10] Johnson never notified the other officers of this request nor made note of it. Apparently, Johnson merely considered this an invocation of the right to remain silent.[11]

Between May 24 and May 26, White was never given an attorney. Also, during that time he was subject to several interrogations by the investigating officers, a lineup, and a palm print. During the interrogation of May 25 White signed waiver forms and also signed typed confessions to other crimes.[12] Before each separate interrogation the officers gave White his *Miranda* rights. White indicated that he understood these rights. On May 26, White was again interrogated, given his *Miranda* rights, and signed a waiver of rights form and a confession typed out by one of the interrogating officers. The officers were not aware of White's prior remark requesting counsel nor did White at any time state that he now wanted counsel appointed nor that he had previously requested counsel. There was testimony that when White was asked if he wanted counsel, he responded in substance "I don't need a lawyer." After signing the confession White and several officers returned to the scene of the crime and reenacted the crime.

III

[1] The initial inquiry is whether White made a request for counsel. The district court found that no "clear or unequivocal request" for counsel was made.[13] But it

9. Of course, our decision to affirm the district court makes our resolution of the *Stone v. Powell* issue unnecessary.

10. The testimony on this point is in conflict. At the suppression hearing, held after remand from the Illinois Appellate Court, Captain Johnson testified that White said, in response to a question as to whether he wished to tell why he was incarcerated, that "I'd rather see an attorney." However, after a recess at the hearing Johnson was recalled and testified that White never said anything about an attorney but only that Johnson thought that White merely invoked his right to silence. At the evidentiary hearing White testified that during this recess Johnson conferred with the state's attorney. Thus, Johnson substantially altered his testimony. Johnson's testimony at the evidentiary hearing added little to clarify this point. This is understandable, considering that the incident Johnson described occurred almost ten years ago.

Unfortunately, White's testimony did little to enhance this matter. White did not testify at the suppression hearing ordered by the Illinois Appellate Court and at the trial White testified that he did not even remember being interrogated. At the evidentiary hearing White testified that he had requested counsel. However, White was not entirely sure about what he said to Johnson. At times he said that he told Johnson "I want to see an attorney," while at another time he said that he told Johnson "I'd rather see an attorney."

Thus, the testimony on this point is extremely muddled. While the district court did find that White did not request an attorney it did basically find as a fact that White said in substance "I'd rather see an attorney."

11. It was the practice of the East St. Louis police department to honor a request for counsel and notify all investigating officers of the request.

12. From the record it appears that White was never tried for these other crimes.

13. The district court cited no authority for the proposition that a request for counsel must be "clear and unequivocal." Indeed, the language contained in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) is to the contrary.

The standard of review for the determination of whether the district court's finding of the facts as to the conversation between Johnson and White is the clearly erroneous standard. However, whether the statements made were actually a request for counsel is a legal deter-

does appear that White did state in some form that "I'd rather see an attorney." The district court, however, did not believe that this statement was an actual request for an attorney but rather an invocation of the right to remain silent.

In determining whether a request for counsel was made, the language of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) is instructive.

> If [the accused] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

384 U.S. at 444–45, 86 S.Ct. at 1612 (emphasis added).[14]

[2] Thus, *Miranda* teaches that the request for counsel need not be explicit. Rather it must be determined if there was an indication "in any manner" that the accused desired to consult with an attorney.

[3] The prosecution insists that the focus of the inquiry should be on the totality of the circumstances in which the statement was uttered—Johnson did not have the direct responsibility for investigating the case and only spoke to White for a short amount of time. The district court agreed with this analysis and concluded that under the circumstances, Johnson's conclusion that an attorney was not requested was reasonable.

We reject the application of this approach to the facts before us. This approach places too much emphasis on the subjective interpretation of the police officer and ignores the import of the words uttered by White. There may be certain instances where the officer may have properly concluded that a statement was not a request for a lawyer. *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979) (request to call girlfriend not construed as request for a lawyer). But in this instance White's statement that "I'd rather see an attorney" was a request for counsel. To require a person in custody to be even more specific would be to ignore the language in *Miranda* quoted above.

Other courts have had to determine whether a request for counsel has been made. In *United States v. De Leon*, 412 F.Supp. 89 (D. V. I. 1976) the suspect unsuccessfully attempted to call his lawyer. The suspect then stated that he would like to speak to a lawyer but also stated that he was willing to make a statement. The court stated that this assertion could be interpreted as a willingness to give a statement after the attorney was present or as a waiver of the prior invocation. With such fundamental rights at stake, the court interpreted the statement in the light most favorable to the defendant and held that counsel had been requested. *See also Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978) ("Maybe I should have an attorney" considered a request for a lawyer); *United States v. Clark*, 499 F.2d 802 (4th Cir. 1974) ("I had better talk to a lawyer" considered a request for a lawyer).

Those cases which have discussed the significance of a request by a suspect for the recommendation of a lawyer are inapposite. *See, e. g., Collins v. Pugg*, 435 F.Supp. 1339 (E.D.N.Y.), *aff'd*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 969, 98 S.Ct. 510, 54 L.Ed.2d 167 (1977). The statement in the present case was much more of an affirmative request than the mere request for a recommendation of an attorney. We thus hold that White made a request for counsel.

IV

[4] The prosecution argues that even if there was a request for counsel, this request was later waived. As a preliminary matter we must decide if *Miranda* and *Michigan v.*

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nination. Thus, the district court's finding on this matter is not due the same deference as the findings of fact.

14. In *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) the Supreme Court discussed, in *obiter dictum*, what words were sufficient to invoke a request for counsel under *Miranda*. The suspect in *Frazier* stated that "I think I had better get a lawyer before I talk any more." The rule of *Miranda* was inapplicable to *Frazier* since the trial in *Frazier* had been held before *Miranda* was decided. However, the Court noted that if *Miranda* were applicable it might conclude that this was a request for a lawyer.

Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) construct a *per se* rule requiring that there can be no questioning of a suspect after counsel is requested.[15]

In determining whether there should be a *per se* rule, the touchstone of the analysis is the language in *Miranda*. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474, 86 S.Ct. at 1628.

Further support for the creation of a *per se* prohibition is the language contained in *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). *Mosley* concerned the interrogation of a suspect who had invoked his right to remain silent. The Court held that the police could interrogate a suspect who had previously invoked his right to remain silent. This resumption of questioning was proper only if the suspect's right to remain silent was scrupulously honored. In stating this rule, however, the Court did note that the procedure utilized after an initial request for counsel presented a different matter. That case, the Court stated, was governed by the requirement set down in *Miranda*—no further questioning until the attorney is present.

While the basic idea behind the Court's discussion in *Miranda* and *Mosley* is salutary, a *per se* approach may be going too far toward protecting the rights at stake. A *per se* rule which provided that a suspect could never waive a prior request for counsel would imprison a suspect in his privileges. *Cf. Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (cannot force trial counsel on defendant who wishes to proceed without counsel). This is not to say that continued interrogation or any coercion causing the suspect to waive the request need be condoned. Instead, it merely is an acknowledgement that in certain instances, for various reasons, a person in custody who has previously requested counsel may knowingly and voluntarily decide that he no longer wishes to be represented by counsel.

The creation of a *per se* rule would cause courts to lose touch with the purpose and policies behind the *Miranda* decision—a knowing and free exercise of constitutional rights.[16] Adoption of a *per se* rule would lead to a mechanical approach to the resolution of the particular cases we face. Thus, we eschew the *per se* rule and instead choose to adopt a case-by-case analysis in which the concerns which are reflected in *Miranda* and *Mosley* are incorporated into the analysis. *United States v. Rodriguez-*

15. White relies on *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972) as creating such a *per se* rule. In *Williams* the suspect stated that he would like a lawyer before making a statement. The state's attorney dissuaded the appellant from having a lawyer. The court excluded this statement stating that the prosecution cannot continue its interrogation and not appoint counsel.

While *Williams* has been interpreted as setting forth a *per se* rule, *United States ex rel. Sanders v. Rowe*, 469 F.Supp. 1126 (N.D.Ill. 1979), this court did not explicitly hold that a waiver could never be obtained. Indeed, the issue of waiver was not even presented in *Williams*. Rather, the court had to determine whether the continued questioning after a request for counsel required that certain statements be inadmissible. Thus, to now hold that there is no *per se* rule does not require that *Williams* be overruled. The case is clearly distinguishable.

Also, it would be hard to understand how *Williams* could have created a *per se* rule in light of this court's decision in *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968). In *Nielsen* the accused stated that he would not sign a waiver form until he could talk to his lawyer. Thereafter, the suspect continued to talk to the F.B.I. agents and expressed a willingness to talk. This court apparently treated the case as an invocation of the right to silence. However, there is language in the case indicating that the right to counsel can be waived.

16. A hypothetical case might demonstrate the folly of a *per se* rule. Consider the case where a suspect requests counsel and then is put in a cell. The suspect talks a guard who happens to pass his cell that he has changed his mind. He says that he does not want a lawyer and would like to confess. Certainly it serves no valid policy behind *Miranda* to refuse to accept the waiver. Indeed, it contravenes the idea in *Miranda*—that an individual should be able to freely exercise his rights.

While these are not the facts presented in this case they do illustrate the harm that our creation of a *per se* rule could do in future cases faced in this circuit.

Gastelum, 569 F.2d 482 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978).

White relies on the language in *Mosley* which reaffirmed, in *dictum*, the procedure set forth in *Miranda*. We do not read that language in *Mosley* as governing this issue. Instead we note the broader message which pervades the *Mosley* decision: that is—the *Miranda* procedures are flexible and are not controlled by the specific language in that decision. Thus, looking at the broader import of *Mosley*, we refuse to read that case as constructing a *per se* rule. *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976).

Those courts confronted with the issue of whether a *per se* prohibition on post-request statements should attach overwhelmingly have held that there is no *per se* rule. *United States v. Rodrigues-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978); *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) (en banc); *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908, 97 S.Ct. 2955, 53 L.Ed.2d 1081 (1977); *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied*, 434 U.S. 947, 98 S.Ct. 1419, 47 L.Ed.2d 354 (1976).[17]

Therefore, we hold that *Miranda* and *Mosley* do not create a *per se* rule prohibiting a waiver and a resumption of questioning. However, we note that the state has a heavy burden of proving waiver. We now proceed to discuss the various components of this waiver test and its application to the case before us.

V

[5, 6] The general test for waiver of an individual's constitutional right is whether the government has shown "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Besides consideration of the background, experience, and conduct of the accused, courts which have had to determine if a request for counsel has been waived have attempted to focus on other factors in analyzing the content of the *Johnson* test. *United States v. Rodrigues-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978).

One such factor is whether the suspect initiated the contact which led to the statement being made. *See Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908, 97 S.Ct. 2955, 53 L.Ed.2d 1081 (1977). The concern reflected in these cases is that when a suspect does not initiate the contact with the police, it is more likely that the decision to waive the previous request will be the result of coercion or pressuring.

Yet there is no reason to conclude that as a prerequisite to a waiver, the suspect must have always initiated contact with the police.[18] There may be instances where for some valid reason the police must contact the accused, and a confession follows this contact. *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978) (police procedure to inform accused of new charge and after this contact suspect indicated desire to talk). Of course, in those cases where the suspect does initiate the waiver, it will be much easier for the state to discharge its heavy burden of proving waiver. But this does not mean that where the police contact the suspect after a request for counsel the prosecution is prohibited from ever demonstrating a waiver.

[7] We believe that under the particular circumstances of this case the fact that the police initiated contact with White does not prohibit a showing of waiver. The record indicates that White was subjected to interrogation after the request. But it is also

17. The Sixth Circuit has refused to reach the issue. *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978), holding that on the facts presented no waiver was made.

18. The Ninth Circuit has explicitly rejected a rule which would require, as proof of waiver, that the accused initiated the waiver. The court believed that such a rule would be tantamount to adopting the *per se* rule that it chose to reject. *United States v. Rodrigues-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978)

clear that this decision was made without any knowledge of the original request for counsel. Thus, we do not have a case where it is known by all the investigating officers that the suspect has requested counsel.[19] Rather, the request for counsel was an off-hand request that was not passed on to the investigating officers.[20] The decision of the investigating officers to resume interrogation was caused solely by the unique circumstances which transpired at the time White was brought before Johnson: Johnson was not the investigating officer; White's request for counsel was off-hand, and the meeting lasted only several minutes.

[8] Another factor which can indicate that a waiver was executed was the time delay between the original request and the interrogation. Courts have viewed a waiver which follows soon after the initial request as suspect. *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908, 97 S.Ct. 2955, 53 L.Ed.2d 1081 (1977), *United States v. Nixon*, 571 F.2d 1121 (9th Cir. 1978), *Government of Canal Zone v. Gomez*, 586 F.2d 1289 (5th Cir. 1978). A waiver obtained in such a case is likely to be the result of continued comment or questioning by the authorities. *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972). A time lapse between the request for counsel prevents this badgering or harassment. Also, it gives the suspect time to reconsider his prior decision and evaluate the situation without the presence or prodding of officials.[21] *United States v. Lewis*, 425 F.Supp. 1166 (D.Conn. 1977).

[9] In the present case, White was immediately returned to his cell after the request for counsel. Interrogation for the particular crime with which he was charged did not occur until two days later. During this time White had an opportunity to reflect on his previous request.

It might be contended that the incarceration had a coercive effect on White. We reject that argument. Our reading of the record indicates that after White requested counsel, he never again expressed a concern over the failure to have counsel appointed. In fact, during his interrogation and after being given his *Miranda* warnings, he stated that "I don't need a lawyer."

We are mindful of the language in *Miranda* which warns of the coercive effect of incommunicado interrogation. But in every instance in which a suspect is held in jail it does not follow that there was in fact coercion. Instead, each case must depend on the specific facts presented to the court in the record.[22] For us to hold that incarceration always leads to coercion would be to ignore the facts of this case. Thus, it cannot be said that the time delay had a coercive effect upon White.

Finally, we note several other key factors which lead us to conclude that on the facts

19. Thus, a different case might be presented where the accused makes a clear request for counsel which is transmitted to all involved officers. A decision to resume interrogation in that case would require a different analysis.

20. We do not mean to say that a request to a non-investigating officer is without import. To the contrary, in the ordinary case the accused may be arrested by non-investigating officers. A clear request made in these cases will be imputed to all of the officers. In the present case because of the nature of the exchange the request was not passed on.

21. The emphasis that we put on particular factors in this case does not necessarily mean that the presence or absence of the factor in a future case will be determinative. For instance, we note here that a time delay can be a factor in a finding of waiver. However, we do not condone the practice where the authorities know a request for counsel has been made and merely wait a period of time to resume questioning. As noted above we deal here with officers who were understandably unaware of the request for counsel. We do not interpret *Edwards* to require a *per se* rule. However, we are cognizant of the differences between the request for counsel and an invocation of the right to remain silent and do not necessarily approve of the use of parallel procedures in the two cases.

The waiver analysis is one which depends on the totality of the circumstances.

22. This distinguishes the present case from *United States v. Womack*, 542 F.2d 1047 (9th Cir. 1976). In *Womack* the suspect made several requests for counsel. Those requests were unanswered and the next morning the suspect was again questioned. The suspect testified that a new request was not made because he

of this case a waiver was executed. Before each separate interrogation White was given *Miranda* warnings. *United States v. Evans*, 575 F.2d 1286 (9th Cir.), *cert. denied*, 439 U.S. 854, 99 S.Ct. 165, 58 L.Ed.2d 160 (1978). *But see Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978). The waiver of these rights was a signed waiver. Also, the confession was signed by White. *United States v. Lewis*, 425 F.Supp. 1166 (D.Conn. 1977). We also note that while White did not explicitly waive his previous request for counsel, his comment "I don't need a lawyer" is very close to an explicit waiver. *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978).

In conclusion, we hold that in this case White waived his request for counsel. The officers who interrogated White were never informed of the request for counsel. This is understandable considering the peculiar nature of the colloquy between White and Johnson. The waiver was not the result of coercion nor the result of interrogation which immediately followed the initial request. Finally, White was given his *Miranda* warnings several times, signed a written waiver of these rights, and made what was almost an explicit waiver of his prior request for counsel.

The judgment of the district court is affirmed.

HARLINGTON WOOD, Jr., Circuit Judge, concurring.

I concur in the result, but also I agree with Judge Morgan's interpretation of the defendant's brief conversation with Johnson. Considering the conversation and the circumstances in which the conversation took place, I do not construe it as a request for counsel, but at most as only a way of telling Johnson the defendant did not care to talk to him. In discussing waiver, Judge Swygert notes that after the Johnson conversation the defendant never again expressed concern over lack of counsel. If there was in fact a quick change of mind by defendant as to the need for counsel, it appears to have occurred without reason or explanation. I am satisfied that there was no change of mind. The defendant's obvious lack of concern about having counsel expressed shortly after the Johnson conversation is entitled to some weight in interpreting that conversation.

was scared and believed that since his previous requests had been ignored it would be futile to again request counsel. The court held that there was not a waiver and concluded that a new request was not made because the suspect thought that such a request would again be ignored.

Unlike *Womack*, White did not make several unequivocal requests for counsel but rather one off-hand comment to a non-investigating officer. Also, in the present case there was no testimony by White about the failure to again request counsel or the fear of incarceration. White would urge that we presume such ill effects from the incarceration. In certain cases